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Report of the Secretary-General on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia, including, in particular, options for creating special domestic chambers possibly with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements, taking into account the work of the Contact Group on Piracy off the Coast of Somalia, the existing practice in establishing international and mixed tribunals, and the time and resources necessary to achieve and sustain substantive results

Summary

The Security Council, in its resolution 1918 (2010) of 27 April 2010, requested the Secretary-General to present a report on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia, including, in particular, options for creating special domestic chambers possibly with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements, taking into account the work of the Contact Group on Piracy off the Coast of Somalia, the existing practice in establishing international and mixed tribunals, and the time and resources necessary to achieve and sustain substantive results.

In response, the Secretary-General has identified seven options for the Security Council to consider:

Option 1: The enhancement of United Nations assistance to build capacity of regional States to prosecute and imprison persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia

Option 2: The establishment of a Somali court sitting in the territory of a third State in the region, either with or without United Nations participation

Option 3: The establishment of a special chamber within the national jurisdiction of a State or States in the region, without United Nations participation

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Option 4: The establishment of a special chamber within the national jurisdiction of a State or States in the region, with United Nations participation

Option 5: The establishment of a regional tribunal on the basis of a multilateral agreement among regional States, with United Nations participation

Option 6: The establishment of an international tribunal on the basis of an agreement between a State in the region and the United Nations

Option 7: The establishment of an international tribunal by Security Council resolution under Chapter VII of the Charter of the United Nations

Option 1 is already ongoing and has achieved some success. In particular, Kenya opened a new high security courtroom on 24 June 2010 in Shimo La Tewa, Mombasa, which was built by the United Nations Office on Drugs and Crime Counter-Piracy Programme. This courtroom will be used to hear piracy cases and to try other serious criminal offences. The Security Council may wish to consider continuing, and building on, the role it has played in its resolutions to enhance option 1. A potential host State would need to be identified for each of the other options. It would be necessary to ascertain the preferences of that potential host State, including whether it would accept international participation in such mechanism, and, if so, in what form. The advantages and disadvantages of the options are therefore analysed in the light of general considerations that apply.

The need for sufficient arrangements for imprisonment in the region, ideally in Somalia, may be as critical as the options for prosecution. This is particularly so given the large numbers of suspects apprehended by naval States. The need for such imprisonment arrangements to be developed is likely to be a significant factor in any process to seek to identify a potential host State for a new judicial mechanism.

The Security Council request emphasizes the important goal of achieving and sustaining substantive results. A key consideration in this respect would be the need for sufficient political and financial commitment among States, in difficult economic times, not only to establish a new judicial mechanism, but also to sustain it. A new judicial mechanism to address piracy and armed robbery at sea off the coast of Somalia would be addressing a different situation to that addressed by the existing United Nations and United Nations-assisted tribunals. Such a mechanism would face ongoing criminal activity and potentially a large caseload, with no predictable completion date.

Option 1: The enhancement of United Nations assistance to build capacity of regional States to prosecute and imprison persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia

This option involves consolidating and building on the successes already achieved, such as the opening of the new high security courtroom in Shimo La Tewa, Mombasa, to hear piracy cases and to try other serious criminal offences. The enhancement of the capacity of regional States would involve both sustaining and increasing the capacity of those States already conducting prosecutions, and encouraging further regional States to accept the transfer of suspects for prosecution. This would require political engagement with regional States, including potentially through the Contact Group on Piracy off the Coast of Somalia, and sustained funding for United Nations programmes, including through the International Trust Fund to Support Initiatives of States Countering Piracy. It is also likely to require

arrangements to be in place for the imprisonment in third States of those convicted, and the repatriation of those not convicted. Improving the standards of prisons in Somalia, in particular in the regions of Puntland and Somaliland, is likely to be key to making progress. Sufficient funding for assistance programmes in Somalia will be essential to developing the long-term solution of prosecution and imprisonment by Somalia. The Security Council may wish to consider continuing, and building on, the role it has played in its resolutions to enhance option 1.

Option 2: The establishment of a Somali court sitting in the territory of a third State in the region, either with or without participation by the United Nations

The purpose of this option would be to provide a secure environment in which a Somali court could conduct prosecutions. This would require an agreement between Somalia and the host State, and, if established with United Nations participation, would also require an agreement with the United Nations. Although the special court would be within Somalia's national jurisdiction, the legislative and criminal procedural framework necessary for conducting piracy prosecutions is currently fragmented, and substantial assistance would be needed to enable prosecutions to be conducted to international standards. Identifying a regional State willing and able to provide the facilities for hosting a Somali court may present challenges. Assistance to the Somali court under this option would not benefit the host State's criminal justice system. Advantages may include enabling Somalia to play a role in the solution to the problem of piracy; and capacity-building of the Somali judicial system, thereby contributing to strengthening the rule of law in Somalia. Disadvantages may include the time necessary for its establishment; and higher costs than those for option 3, given the substantial assistance likely to be necessary. Discussions in Working Group 2 on legal issues of the Contact Group have raised issues concerning the adequacy of Somalia's piracy laws and the capacity of Somalia's judicial system. These issues may need to be addressed in order for this option to be feasible. The advantages of this option would also need to be weighed against the advantages of assisting Somali courts to prosecute within Somalia, if feasible.

Option 3: The establishment of a special chamber within the national jurisdiction of a State or States in the region, without United Nations participation

The first consideration under this option is whether the State concerned is conducting or could potentially conduct a sufficient number of piracy prosecutions to justify a special chamber dedicated to such prosecutions. Somalia may be the one State at present where, in the regions of Puntland and Somaliland, there may be a sufficient volume of prosecutions to justify a special chamber. At present, however, there appears to be insufficient donor confidence in the standards of these prosecutions to fund United Nations assistance programmes at the same levels as in other regional States. A special chamber in a State in the region would have the advantages of being part of an existing jurisdiction with established crimes and procedures; cost-effectiveness; and proximity for the purpose of transfer of suspects by patrolling naval States, and the transfer of those convicted to third States for imprisonment. Possible disadvantages may include drawing resources from the State's criminal justice system more broadly; "two-tier" justice; and limited capacity.

Option 4: The establishment of a special chamber within the national jurisdiction of a State or States in the region, with United Nations participation

Participation by United Nations selected judges, prosecutors and/or staff in such a chamber would require an agreement between the State concerned and the United Nations. As with option 3 above, the first consideration would be whether there are or could potentially be sufficient piracy prosecutions in that State to justify a special chamber dedicated to such prosecutions. The advantages of this option may include being part of an existing jurisdiction with established crimes and procedures; capacity-building for the host State, and possibly other regional States; proximity for the purpose of the transfer of suspects by patrolling naval States, and the transfer of those convicted to third States for imprisonment. Although this option would be relatively cost-effective, it would be likely to be more expensive than option 3. If the host State were Kenya or Seychelles, this option would benefit from their expertise. The disadvantages may include drawing resources from the State's criminal justice system more broadly; and limited capacity. Participation by United Nations judges in the regional States that are conducting piracy trials, or are considering doing so, might in many cases necessitate changes to criminal procedures because these regional States currently have single judge trials.

Option 5: The establishment of a regional tribunal on the basis of a multilateral agreement among regional States, with United Nations participation

This option would require a multilateral treaty to be negotiated among regional States, ideally including Somalia. Participation by United Nations judges, prosecutors and/or staff would require an agreement with the United Nations. The practice of United Nations selected judges being in the majority in chambers in which they sit would need to be assessed in the context of a regional tribunal comprising regional judges. Advantages of this option may include capacity-building for the participating regional States; proximity for the purpose of the transfer of suspects by patrolling naval States, and the transfer of those convicted to third States for imprisonment; and possibly greater capacity than a special chamber within a national jurisdiction. Disadvantages may include the need to establish the jurisdiction of a new tribunal, including the crimes and procedures; the time necessary to establish the tribunal; and, likely, higher costs than a special chamber within a national jurisdiction. A risk might be that such a regional tribunal may draw expertise and resources from the jurisdictions of regional States conducting prosecutions.

Option 6: The establishment of an international tribunal on the basis of an agreement between a State in the region and the United Nations

This option would require an agreement between the United Nations and the State concerned to establish an international tribunal with both United Nations and national components. The practice has been to establish such tribunals with United Nations selected judges in the majority. For the reasons set out in connection with option 3, there may be challenges associated with the establishment of a tribunal with Somalia at present. Whether to seek to establish such a tribunal with any other regional State, rather than pursuing options 3 or 4, would require careful assessment. If the host State were Kenya or Seychelles, the tribunal would benefit from their growing expertise, but may also draw such expertise and resources from prosecutions

within their national jurisdiction. Advantages of this option may include capacity-building for the host State, although probably less so than option 4; and proximity for the purpose of the transfer of suspects by patrolling naval States, and the transfer of those convicted to third States for imprisonment. Disadvantages may include the need to establish the jurisdiction of a new tribunal, including the crimes and procedures; the time necessary to establish the tribunal; and, likely, higher costs than a special chamber within the State's national jurisdiction.

Option 7: The establishment of an international tribunal by Security Council resolution under Chapter VII of the Charter of the United Nations

An international tribunal established by Security Council resolution under Chapter VII would comprise entirely United Nations selected judges, prosecutors and staff, and might or might not be located in the region. Inclusion of United Nations selected judges from the region, including Somalia, would promote regional capacity-building. If judges, prosecutors and/or staff were drawn from Kenya or Seychelles, the tribunal would benefit from their experience, but their inclusion may risk inhibiting those States' capacity to prosecute nationally. Although the time necessary for the Council to negotiate the necessary Chapter VII resolution may be relatively short, an assessment of the overall time required in connection with this option would include the time required to identify and negotiate with a potential host State. The advantages of this option may include greater capacity than a special chamber within a national jurisdiction; and the Council's ability to require the cooperation of third States with the tribunal through its resolution under Chapter VII. Disadvantages may include higher costs; and, if not located in the region, lack of proximity for the purpose of the transfer of suspects by patrolling naval States, and the transfer of those convicted to third States, if imprisonment is to take place in the region.

Further options raised by members of the Contact Group on Piracy off the Coast of Somalia

Some members of the Contact Group also raised the options of amending the statutes of the International Criminal Court (ICC), the International Tribunal for the Law of the Sea and the African Court on Human and Peoples' Rights. Possible amendment of the Rome Statute of the ICC was not taken up by the States parties at the first review conference, which took place in June 2010 in Kampala. The International Tribunal for the Law of the Sea and the African Court on Human and Peoples' Rights are courts that determine inter-State disputes and have no criminal jurisdiction. Amendment of their statutes was therefore considered not to be an option.

The role of Somalia

Whichever of the options, if any, may be favoured by the Security Council, the longer-term need to assist Somalia and its regions to develop the capacity to prosecute and imprison to international standards will be key in sustaining results in the fight against impunity for those responsible for acts of piracy and armed robbery at sea off the coast of Somalia.

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I. Introduction

1. The present report is submitted pursuant to Security Council resolution 1918 (2010) of 27 April 2010. The Security Council requested the Secretary-General to present a report on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia, including, in particular, options for creating special domestic chambers possibly with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements, taking into account the work of the Contact Group on Piracy off the Coast of Somalia, the existing practice in establishing international and mixed tribunals, and the time and resources necessary to achieve and sustain substantive results.

2. This report describes, in section II, the nature and extent of the problem of piracy and armed robbery at sea off the coast of Somalia and its causes. Section III sets out the applicable law. Section IV describes the current United Nations approach to assisting States to prosecute and imprison persons responsible for acts of piracy and armed robbery at sea within their national jurisdictions. Section V analyses various options for furthering the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia. Section VI provides a conclusion. The annexes to the report contain detailed information on the existing practice of the United Nations in establishing and participating in United Nations and United Nations-assisted tribunals (annex I), and on relevant discussions in the Contact Group on Piracy off the Coast of Somalia (annex II).

3. In this report, the term "United Nations participation" is used to refer to the participation by judges, prosecutors and/or staff selected by the United Nations in a judicial mechanism. It is to be distinguished from "United Nations assistance", which refers to technical assistance by the United Nations to assist a State or judicial mechanism to build its capacity. The International Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) are referred to as "United Nations tribunals" because they are subsidiary organs of the Security Council and therefore form part of the United Nations Organization. Tribunals that do not form part of the United Nations Organization, but are established on the basis of an agreement between the United Nations and the State concerned, are referred to as "United Nations-assisted tribunals". These United Nations-assisted tribunals are sometimes also referred to as "hybrid" or "mixed" tribunals, as in the above request of the Security Council, owing to their mix of international and national components.

II. Nature and extent of piracy and armed robbery off the coast of Somalia

A. The situation in Somalia

4. Acts of piracy and armed robbery at sea off the coast of Somalia are a symptom of the instability and lack of rule of law in Somalia. The lack of effective governance has persisted since the overthrow of the government of Siad Barre on 31 January 1991. This situation has had a profound negative impact on the

population, which has not enjoyed the benefits of the rule of law for two decades. The Transitional Federal Government of Somalia is attempting to establish its governance structures and the rule of law, including through the development of the security and justice sectors. However, in most of south-central Somalia, militia groups are still in control, limiting the capacity to establish law and order. Pirate attacks are severely constraining the importation of goods into the country. The prices of food have risen, and investment in the local economy has been affected as building materials and other raw materials have become less available. Unemployment is widespread. These conditions have led many young Somalis to join armed groups and militias, or to be drawn into criminal activity, including piracy.

5. Insecurity in south-central Somalia has made it almost impossible for the judicial system to function. The United Nations Development Programme (UNDP), in cooperation with the Transitional Federal Government Ministry of Justice and the Supreme Court, is identifying immediate, short- and long-term needs in the justice system, including the appointment of judges, and providing training for judicial staff. Over the past two years, the United Nations, UNDP, the African Union Mission for Somalia (AMISOM), the Transitional Federal Government and other partners have been working on strengthening the police and security forces. The United Nations Office on Drugs and Crime (UNODC) and UNDP are working to improve prison standards in the Puntland and Somaliland regions of Somalia.

6. A sustainable response to the situation in Somalia, and therefore to piracy and armed robbery at sea, requires the establishment of effective governance, the rule of law, credible security sector institutions, and alternative livelihoods for the Somali people. This requires the Transitional Federal Government and the regional authorities to lead in the prioritization and coordination of efforts. For this purpose, in January 2010, the United Nations Political Office for Somalia (UNPOS), the Department of Political Affairs of the United Nations Secretariat, and the International Maritime Organization (IMO) assisted in the establishment of the Somali Counter-Piracy Technical Coordination Mechanism in Kampala, also referred to as the Kampala process.[1] The Kampala process comprises technical representatives from the Transitional Federal Government, and the regions of Puntland and Somaliland, as well as representatives from relevant United Nations offices, and is intended to improve the flow of information between the Somali central and regional authorities and their cooperation with the international community on counter-piracy initiatives. It seeks to establish a consolidated approach among the authorities through sharing information and coordinating activities in the areas of legislative review, prisons, fisheries and maritime safety and security.

[1] See the communique of the fifth plenary meeting of the Contact Group on Piracy off the Coast of Somalia (28 January 2010), which refers to the Contact Group welcoming the agreement that led to the creation of the mechanism (available at www.norway-un.org/News/Latest_news/COMMUNIQUE-Contact-Group-on-Piracy-off-the-Coast-of-Somalia).

B. Incidents of piracy and armed robbery at sea off the coast of Somalia and the naval operations

7. Piracy attacks around the world have continued to escalate in recent years, owing almost entirely to rising incidents of piracy off the coast of Somalia. The number of attacks off the coast of Somalia has steadily increased since 1991, and over the past two years has increased from 111 vessels attacked in 2008 to 217 vessels attacked in 2009.[2] Bearing in mind that each incident involves a number of individuals, it is clear that there are large numbers of persons involved. There were 30 attacks during the first quarter of 2010.[3] According to the United Nations Office on Drugs and Crime, the pirates operate from around 70 camps on beaches on the Somali coast, which is approximately 1,800 miles long. Their methods have become increasingly sophisticated, indicating greater planning, financing and organization. To reach far out to sea, they make use of larger vessels that have been captured as "mother ships" to tow smaller and faster boats close to the point of attack. The mother ships are often loaded with fuel, water and food. Pirates often now have Global Positioning Satellite (GPS) equipment and heavier weapons, including rocket-propelled grenades.

8. While the number of attacks remains high, increased naval patrols off the Horn of Africa and in the Gulf of Aden have effectively reduced the success rate of these attacks. In 2007, 63 per cent of attacks were successful; in 2008, 34 per cent were successful; in 2009, 21 per cent were successful; and the figure for 2010 is likely to be below 20 per cent.[2] The decrease in success is attributable to the additional defensive measures put in place by merchant ships, their more cautious navigational routes, and effective naval operations. Nevertheless, as at 15 May 2010, some 450 mariners were being held hostage on vessels captured by pirates off the coast of Somalia. The involvement of naval vessels from more than 30 States represents one of the largest peacetime naval operations ever. Many States take part in one of three naval operations in the region: the European Union naval operation Atalanta (directed from Northwood, United Kingdom of Great Britain and Northern Ireland), the North Atlantic Treaty Organization (NATO) (also directed from Northwood) and the Coalition Maritime Forces (directed from Bahrain). In addition, many States have sent naval vessels to the region under national command.

9. Although the number of patrolling naval States involved is high, the number of ships on patrol off the coast of Somalia at any one time may be no more than 10. This is because they need to refuel and replenish their supplies, and the distance to their home State is often great. Given the vast area of ocean affected, maritime patrol aircraft play an important role in identifying pirates, directing naval ships to interdict, and advising merchant ships to alter course. These aircraft are based in Seychelles, Kenya and Djibouti. In order to be effective, naval operations apprehending suspects should result in prosecutions. The risk otherwise is that suspects are released at sea, or repatriated, and return to commit further acts of piracy or armed robbery at sea.

[2] Statistics provided at the Seychelles Regional Conference on Piracy, held in May 2010.

[3] See ICC International Maritime Bureau, "Piracy and Armed Robbery against Ships, report for the period 1 January-31 March 2010" (available at www.icc-ccs.org).

III. Applicable law

10. The international legal regime applicable to piracy consists of the 1982 United Nations Convention on the Law of the Sea,[4] other international and regional instruments, relevant Security Council and General Assembly resolutions, and national implementing legislation.

A. International and regional instruments

11. The international legal regime applicable to piracy is set out primarily in the United Nations Convention on the Law of the Sea, which codifies customary international law.[5] In accordance with article 100 of the Convention, the primary obligation for all States is to cooperate to the fullest possible extent in the repression of piracy.[6] The definition of piracy is contained in article 101 of the Convention.[7] It includes any illegal acts of violence, detention or depredation committed for private ends by the crew or passengers of a private ship against another ship, or persons or property on board that ship. In order to constitute acts of piracy, such acts have to be committed on the high seas, outside the jurisdiction of any State, or within the exclusive economic zone of any State.[8] The definition also includes any act of inciting or of intentionally facilitating any of the aforementioned acts.[9] Some acts of piracy may also constitute offences under other international legal instruments, such as the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention),[10] the 1979 International Convention against the Taking of Hostages[11] and the 2000 United Nations Convention against Transnational Organized Crime.[12]

12. There is universal jurisdiction over acts of piracy on the high seas and in the exclusive economic zones of States.[13] This means that any State may seize a pirate ship on the high seas or in the exclusive economic zone of any State, arrest the persons on board, and prosecute them.[14] Universal jurisdiction is "permissive",

[4] The 1958 Convention on the High Seas contains provisions relating to piracy very similar to those of the United Nations Convention on the Law of the Sea.

[5] The United Nations Convention on the Law of the Sea was adopted by the Third United Nations Conference on the Law of the Sea and opened for signature on 10 December 1982 (available at www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm).

[6] See International Law Commission, *Articles Concerning the Law of the Sea with Commentaries*, 1956 (II) *Yearbook of the International Law Commission*, art. 38; the International Law Commission observed in its commentary that "[a]ny State having an opportunity of taking measures against piracy, and neglecting to do so, would be failing in a duty laid upon it by international law. Obviously, the State must be allowed a certain latitude as to the measures it should take to this end in any individual case".

[7] See United Nations Convention on the Law of the Sea, art. 101, for its definition of piracy (available at www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm).

[8] See United Nations Convention on the Law of the Sea, art. 58, para. 2.

[9] See United Nations Convention on the Law of the Sea, art. 101, paras. (b) and (c). The definition does not refer to attempts to commit acts of piracy, or to conspiracy relating to acts of piracy.

[10] Adopted by the International Maritime Organization at Rome on 10 March 1988; some States have taken the view that the SUA Convention was intended to apply to acts of terrorism only.

[11] See General Assembly resolution 34/146.

[12] See General Assembly resolution 55/25.

[13] See United Nations Convention on the Law of the Sea, art. 105.

[14] See United Nations Convention on the Law of the Sea, art. 58, para. 2, and art. 105.

which means that States are entitled to exercise jurisdiction, but are not obliged to do so. Acts when committed within the territorial sea of a State, which would be piracy if committed on the high seas, are referred to as "armed robbery at sea" or "armed robbery against ships".[15] The United Nations Convention on the Law of the Sea does not contain any provisions on armed robbery at sea, and universal jurisdiction does not apply to these acts. The coastal State has jurisdiction over such acts committed in its territorial sea.[16]

13. At the regional level, the Djibouti Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden (Djibouti Code of Conduct) is a non-binding instrument primarily for cooperation among States in the region. It was concluded under the auspices of IMO on 29 January 2009.[17] The signatories to this Code have committed themselves to reviewing their national legislation to ensure that there are national laws in place to criminalize piracy and armed robbery at sea, and adequate guidelines for the exercise of jurisdiction, and the conduct of investigations and prosecutions of alleged offenders. They have committed to capacity-building through cooperating among themselves in the repression of piracy and armed robbery at sea, and sharing information. IMO has undertaken a broad capacity-building initiative to assist the signatories in the implementation of the Djibouti Code of Conduct.[18] It has also adopted a series of other guidance documents on how to prevent, prepare for, and react to incidents of piracy and armed robbery at sea,[19] including the Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships.[20]

B. Security Council and General Assembly resolutions

14. The Security Council has established an additional framework for States cooperating with the Transitional Federal Government to combat piracy and armed robbery at sea. In resolution 1816 (2008) of 2 June 2008, the Security Council called on all States to "cooperate in determining jurisdiction, and in the investigation and prosecution of persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia", consistent with applicable international law. In the same resolution, the Security Council decided that, for a period of six months, States cooperating with the Transitional Federal Government in the fight against piracy and armed robbery at sea off the coast of Somalia, for which advance notification has been provided by the Transitional Federal Government to the Secretary-General, may "[e]nter the territorial waters of Somalia for the purpose of repressing acts of piracy

[15] See International Maritime Organization resolution A.26/Res.1025 (2009) for a definition of armed robbery.

[16] Armed robbery at sea also constitutes an offence under the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention).

[17] It has 15 signatories: Comoros, Djibouti, Egypt, Ethiopia, Jordan, Kenya, Madagascar, Maldives, Mauritius, Saudi Arabia, Seychelles, Somalia, the Sudan, United Republic of Tanzania and Yemen.

[18] A multi-donor Djibouti Code Trust Fund has been established in this regard.

[19] See www.imo.org; IMO adopted a revised version of its Recommendations to Governments for preventing and suppressing piracy and armed robbery against ships, Guidance to ship-owners and ship operators, shipmasters and crews on preventing and suppressing acts of piracy and armed robbery at sea, and the Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships.

[20] See International Maritime Organization resolution A.26/Res.1025 (2009).

and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law", and "[u]se, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery". This authorization has been extended for successive one-year periods pursuant to Security Council resolutions 1846 (2008) of 2 December 2008 and 1897 (2009) of 30 November 2009.

15. In resolution 1846 (2008), the Security Council also noted that the SUA Convention provides for parties to create criminal offences, establish jurisdiction and accept delivery of persons responsible for, or suspected of, seizing or exercising control over a ship by force or threat thereof or any other form of intimidation. It urged States parties to the SUA Convention to fully implement their obligations under this Convention, and to cooperate with the Secretary-General and IMO to build judicial capacity for the successful prosecution of persons suspected of piracy and armed robbery at sea off the coast of Somalia. In resolution 1851 (2008) of 16 December 2008, the Security Council decided that for 12 months States and regional organizations cooperating in the fight against piracy and armed robbery at sea off the coast of Somalia, for which prior notification had been provided by the Transitional Federal Government to the Secretary-General, could "undertake all necessary measures that are appropriate in Somalia, for the purposes of suppressing acts of piracy and armed robbery at sea" in accordance with "applicable international humanitarian and human rights law". Further, Security Council resolution 1897 (2009) called on States to assist Somalia, at the request of the Transitional Federal Government and with notification to the Secretary-General, to strengthen capacity in Somalia, including regional authorities, to bring to justice those who are using Somali territory to plan, facilitate or undertake criminal acts of piracy and armed robbery at sea, consistent with applicable international human rights law.

16. The General Assembly has also called upon States to take appropriate steps under their national law to facilitate the apprehension and prosecution of suspected pirates[21] and urged all States, in cooperation with IMO, to actively combat piracy and armed robbery at sea by adopting national legislation.[22] The Security Council, in its resolution 1918 (2010), noted with concern that "the domestic law of a number of States lacks provisions criminalizing piracy and/or procedural provisions for effective criminal prosecution of suspected pirates".

C. National law and implementation of the international regime

17. Piracy is a crime that has existed in national jurisdictions, in some cases, for hundreds of years.[23] The elements that are needed within the national jurisdiction for successful prosecutions are criminal offences of piracy and armed robbery at sea; criminal responsibility of those who participate in, or attempt to commit, such offences; provisions establishing national criminal jurisdiction over piracy offences committed on the high seas; and the necessary evidentiary and procedural provisions to conduct prosecutions.

[21] See General Assembly resolution 64/71, para. 72.

[22] Ibid., para. 74.

[23] The legislation of the United States is over 100 years old, whereas the piracy law of Seychelles is only two months old.

18. The general legal framework that applies to the criminal trial procedure, and the rules of evidence, are determined by the traditions of the State concerned. The prosecutions of those suspected of piracy have taken place in States from common law, civil law and Islamic law traditions. This variation is a natural consequence of the existence of universal jurisdiction over acts of piracy. While it has been suggested that it may be unsatisfactory to have individuals who commit similar offences off the coast of Somalia facing different forms of trial, this same variation applies to persons accused of other extraterritorial offences, including transnational organized crime, terrorism and drug smuggling. Further, the national court determines the sentence in accordance with its own traditions. In general, most legal systems reflect the seriousness of the crime of piracy with an appropriately serious penalty.

IV. Current approach to prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia

A. National prosecutions

19. Prosecutions of acts of piracy are currently ongoing in 10 States: Kenya, Seychelles, Somalia (in the Somaliland and Puntland regions), Maldives, Yemen, the Netherlands, United States of America, France, Spain and Germany. The prosecutions taking place in the regional States either follow apprehension and transfer by patrolling naval States, or arrest by the law enforcement or military forces of the prosecuting State. The following table sets out the numbers of each as at May 2010.[2]

	Prosecutions following arrest by patrolling naval States	*Prosecutions following arrest by own forces*	*Total*
Kenya	123	0	123
Somalia (Somaliland)	20	80	100
Somalia (Puntland)	60	148	208
Seychelles	11	20	31
Yemen	Not known, but some reported	Not known	60 (estimate)
Total			**528**

20. The figures in the table do not indicate the numbers of suspects who are apprehended by patrolling naval States but released. The commanders of the European and NATO naval forces off the coast of Somalia estimate that around 700 suspects apprehended by the ships under their command have been released between January and June 2010. The principal reason cited is lack of evidence sufficient to support prosecution. The majority of these suspects have apparently been released owing to a lack of sufficient evidence for prosecution. This is an issue that would arise irrespective of whether prosecutions are conducted in national courts or in a new judicial mechanism. Some have been released by patrolling naval States that do not have transfer arrangements with regional States, and have adopted a policy of seizing the weapons and then freeing the suspects. Some suspects have been released owing to a failure of the naval patrolling State to find a State, either in

the region or elsewhere, that will agree to accept the transfer of the suspects for trial.

21. In Kenya, there have been 14 prosecutions of 123 suspects since 2006. Nine of these prosecutions concern suspects transferred by the European Union; three prosecutions concern suspects transferred by the United States; two prosecutions concern suspects transferred by the United Kingdom. Two prosecutions are complete: 10 pirates transferred by the United States have each been sentenced to eight years of imprisonment, and eight pirates transferred by the United Kingdom have each been sentenced to 20 years of imprisonment. The opening of a new high security courtroom on 24 June 2010 in Shimo La Tewa, Mombasa, built by the UNODC Counter-Piracy Programme, will enhance Kenya's capacity to conduct piracy prosecutions and prosecutions of other serious criminal offences. In Seychelles, there have been three prosecutions since January 2010. One prosecution concerns suspects transferred by the European Union, and two prosecutions concern suspects arrested by Seychelles. Judicial proceedings have commenced in all of these cases.

22. There are around 40 prosecutions taking place outside the region. In general, patrolling naval States have returned suspects to their own jurisdictions for prosecution where they have a strong national interest, e.g., its flag vessel was attacked, or the crew members were its nationals. However, in practice, most prosecutions take place in the above-mentioned regional States. There are significant logistical challenges for the patrolling naval States in returning suspects for trial in their own jurisdictions. There are concerns about the human rights implications of lengthy detention at sea, and the challenges involved in ensuring prompt access to legal advice and judicial scrutiny while at sea. There are also worries about potential claims for asylum by suspects if brought to the territory of patrolling naval States for prosecution. Finally, some patrolling naval States believe that by providing warships, which are expensive and resource-intensive, they are contributing sufficiently to international counter-piracy efforts.

23. For these reasons, a number of patrolling naval States, and the European Union, have negotiated arrangements directly with regional States that allow for the transfer of suspects and all related evidence to regional States. So far, Canada, China, Denmark, the United Kingdom, the United States and the European Union have transfer arrangements with Kenya,[24] and the United Kingdom and the European Union have transfer arrangements with Seychelles. Under these transfer arrangements, the patrolling naval State or organization apprehends and detains suspects at sea, and requests their transfer to the receiving State. The receiving State decides whether to accept the transfer, including on the basis of a preliminary assessment of the available evidence.[25] The arrangements also provide for the treatment of the suspects in accordance with international human rights standards. Other patrolling naval States and organizations are currently also seeking such arrangements with regional States. There remains a strong need to identify additional States to accept transfers of suspects. Seychelles, with very limited prison capacity, has made the acceptance of suspected pirates conditional on agreement that they be transferred to Somalia to serve any sentence.

[24] The Government of the United Kingdom signed on 11 December 2008 a memorandum of understanding with Kenya for the transfer of pirates.

[25] Both Kenya and Seychelles have refused the transfer of suspects in cases where the evidence was insufficient to provide a realistic prospect of conviction.

B. United Nations assistance

24. A number of United Nations offices are involved in the field in assisting States to prosecute and imprison persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia, including UNODC, UNDP, UNPOS and IMO.

25. UNODC runs assistance programmes in Kenya, Seychelles and the Puntland and Somaliland regions of Somalia. Kenya and Seychelles also benefit from assistance provided by the European Union and the States that have concluded transfer arrangements with them. The assistance provided by the European Union and these States is principally delivered under the UNODC Counter-Piracy Programme, although some of them also provide substantial assistance on a bilateral basis. IMO provides assistance to regional maritime authorities to develop measures to reduce the chance of piracy attacks, and supports UNODC assistance to States in the region to review and improve their counter-piracy legislation. UNDP's work in the Somali courts, and on Somalia's counter-piracy legislation with UNODC and IMO, is critical to long-term efforts to see fair and efficient trials held there.

26. UNODC assistance and capacity-building programmes are largely focused on Kenya and Seychelles, and are in practice linked to these States' transfer arrangements with patrolling naval States and the European Union, because these patrolling naval States and the European Union provide financing. The assistance provided to each State is dependent on the particular needs that are identified in that State. The assistance benefits the national criminal justice system as a whole, not just piracy prosecutions of suspects transferred by naval States, and aims to ensure that the trials and detention are fair and efficient. The main elements of the programme are legislative review and assistance, support to the police, prosecution and judiciary, the provision of logistics and information technology, witness and trial support, prison repairs and refurbishments, training of maritime authorities, prison management and officers, and the development and sharing of regional expertise on these matters. The opening of the high security courtroom in Shimo La Tewa, Mombasa, built by UNODC, will enhance Kenya's capacity to prosecute piracy cases and to prosecute other serious criminal offences. UNODC's development of handover guidance manuals with Kenya and Seychelles has improved the quality of evidence being collected and transferred by patrolling naval States, and should assist in ensuring successful prosecutions. The UNODC programme in Kenya was commenced with funding of $2.3 million, designed to last 18 months and to cover around 30 prosecutions, each with multiple accused. Its programme in Seychelles was commenced with funding of $1.1 million, designed to last 18 months, and to cover prosecutions of around 40 suspects.

27. UNODC is currently also working with the United Republic of Tanzania, Mauritius and Maldives, which are considering undertaking piracy prosecutions. UNODC has completed an assessment mission to Mauritius and Maldives, and has been asked to conduct an assessment mission in the United Republic of Tanzania. It is anticipated that the programme in the United Republic of Tanzania will produce capacity to conduct a similar number of piracy prosecutions as Kenya. UNODC estimates that if Kenya, Seychelles, the United Republic of Tanzania and Mauritius can all be engaged and fully supported, their capacity to prosecute should reach 600 to 800 suspects per year.

28. UNODC assistance in Somalia has three main components: prison reform, legal reform and capacity-building in relation to prosecutions, complementing the work of UNDP, which is engaged in training for the judiciary and police, as well as refurbishment of court infrastructure, in each of the regions of Somalia. The work of UNODC is currently funded to approximately $1.2 million by the International Trust Fund to Support Initiatives of States Countering Piracy off the Coast of Somalia. It is notable that Somalia, in the regions of Puntland and Somaliland, has prosecuted and imprisoned more of those responsible for acts of piracy than all other States combined. UNODC, however, has concluded that significant further assistance is necessary for these prosecutions to meet international standards, in particular in relation to standards of evidence adduced and the provision of legal representation to defendants.

C. Imprisonment and repatriation

29. Imprisonment of those convicted for acts of piracy and armed robbery at sea off the coast of Somalia is a critical issue. It is estimated that the imprisonment requirement by the end of 2011 might be as high as 2,000 persons.[26] This number is much higher than that generated by all of the existing tribunals. Currently, the States conducting prosecutions are detaining the suspects pending trial, and imprisoning those who are convicted. The sentences may be lengthy. In Kenya, for example, sentences of 8 and 20 years have been imposed. As the Chair of Working Group 2 of the Contact Group on Piracy off the Coast of Somalia said in his speech to the General Assembly on 14 May 2010, it is apparent from the experience over the last year that the long-term burden of prosecution is not the prosecution itself, but the consequent imprisonment.

30. Many States in discussions in Working Group 2 on legal issues of the Contact Group considered that it is in the interests of those convicted, and of the enforcing State, that they serve their sentences in the region because of cultural, linguistic and family considerations. For small regional States such as Seychelles, the relative burden of imprisonment is greater than for larger States. The 31 suspects currently held on remand pending trial in Seychelles account for nearly 10 per cent of the prison population. In Kenya, the 123 individuals detained either as suspects or following conviction account for 0.2 per cent of the prison population.

31. All States in the region that are conducting prosecutions, or are considering doing so, have raised the issue of the need to share the burden of imprisonment with third States. Given the origin of most of the suspects, imprisonment in Somalia would be the ideal. Apprehending and prosecuting States considering entering into enforcement of sentence agreements with Somalia in the future are likely to seek assurances about the standards of detention. Additionally, the existing transfer arrangements between patrolling naval States and regional States require the regional State to obtain the permission of the naval State before any transfer of the individuals concerned to any third State. Although Somalia, specifically the Puntland region, has indicated a willingness to accept Somalis convicted in other jurisdictions for imprisonment,[27] assistance is needed to bring prisons up to

[26] There are nearly 600 suspected or convicted pirates detained around the world at the present time.

[27] The Puntland region has also indicated that it will accept the transfer of Somali suspects for prosecution.

international standards.[28] UNDP and UNODC are completing construction of a new prison in Somaliland. UNDP will complete construction of a new prison in Puntland by the end of 2010, and UNODC is refurbishing an existing prison in Puntland. UNODC is working with the authorities of the regions of Puntland and Somaliland to train staff to improve the conditions of detention.

32. Repatriation is a further important issue raised by regional States conducting prosecutions or considering doing so. This situation arises either where a prosecution does not proceed, for example, for lack of evidence, or the accused is acquitted. These States request assurance that such individuals can be repatriated, usually to Somalia, and that the costs of such repatriation should not fall to them.

D. The Contact Group on Piracy off the Coast of Somalia and the International Trust Fund to Support Initiatives of States Countering Piracy off the Coast of Somalia

33. The Contact Group on Piracy off the Coast of Somalia[29] was established on 14 January 2009, to facilitate discussion and coordination of actions among States and organizations to suppress piracy off the coast of Somalia. The Security Council, in resolution 1851 (2008), encouraged "all States and regional organizations fighting piracy and armed robbery at sea off the coast of Somalia to establish an international cooperation mechanism to act as a common point of contact between and among States, regional organizations and international organizations on all aspects of combating piracy and armed robbery at sea off Somalia's coast". The Contact Group leads and coordinates the efforts of States and relevant organizations to counter piracy and armed robbery at sea off the coast of Somalia.

34. The terms of reference for the International Trust Fund were negotiated in the Contact Group on Piracy off the Coast of Somalia, and were formally endorsed by the United Nations Controller and the Contact Group on 27 January 2010. The International Trust Fund has the principal purpose of meeting expenses associated with the prosecution and detention of suspected pirates, as well as other activities related to implementing the objectives of the Contact Group, including supporting relevant legal capacity-building activities. It has received a total of $2,973,900 since its establishment, and has disbursed $2,437,372 to fund a total of six projects supporting prosecution and detention-related activities in Kenya, Seychelles and Somalia, and one project implementing a strategy to enable the Transitional Federal Government to raise awareness among Somali populations of the risks associated with involvement in piracy and other criminal activities, as well as of alternative livelihood options.

[28] The prisons suffer from severe overcrowding, in part owing to the deterioration or collapse of buildings that date back to the colonial era.

[29] The Contact Group on Piracy off the Coast of Somalia currently has 47 States and 7 intergovernmental organizations (African Union, European Union, INTERPOL, IMO, League of Arab States, NATO, and the United Nations Secretariat) that participate in the meetings; shipping industry groups also attend as observers. See annex II to the present report for more details on the Contact Group and the International Trust Fund to Support Initiatives of States Countering Piracy off the Coast of Somalia.

V. Consideration of options as requested by the Security Council

A. Considerations common to those options involving United Nations participation in new judicial mechanisms

Preliminaary considerations

35. A potential host State would need to be identified for any of the possible new judicial mechanisms set out in subsection B below. It would then be necessary to ascertain the preferences of that potential host State, including whether it would accept international participation in a new judicial mechanism, and if so, in what form. The advantages and the disadvantages of the options are therefore analysed in the present report in the light of general considerations that apply. The need for sufficient arrangements for imprisonment in the region, ideally in Somalia, may be as critical as the options for prosecution. This is particularly so given the large numbers of suspects apprehended by patrolling naval States. The need for such imprisonment arrangements to be developed is likely to be a significant factor in any process to seek to identify a potential host State for a new judicial mechanism.

36. The Security Council's request emphasizes the important goal of achieving and sustaining substantive results. A key consideration in this respect would be the need for sufficient political and financial commitment among States, in difficult economic times, not only to establish a new judicial mechanism, but to sustain it. A new judicial mechanism to address piracy and armed robbery at sea off the coast of Somalia would address a different situation to that addressed by the existing United Nations and United Nations-assisted tribunals. Such mechanism would face ongoing criminal activity and potentially a large caseload, with no predictable completion date.

37. A key decision, if a new judicial mechanism were to be established, would be whether its purpose would be to prosecute as many suspects as possible who are apprehended off the coast of Somalia, or to focus on those who finance or plan acts of piracy and armed robbery at sea, or both. Until more is known about the extent to which acts of piracy and armed robbery at sea are organized, or are opportunistic, it is difficult to determine whether focusing prosecutions on those who finance and organize these acts would help to prevent them occurring. Further, if a new judicial mechanism were to have jurisdiction over those who finance and organize, it would be dependent on the cooperation of the States where such persons are located for the investigation and transfer of suspects.

Mandates and legal bases

38. If a decision were made to establish a new judicial mechanism with United Nations participation, whichever option is chosen, the Secretary-General would need a mandate from a political organ of the United Nations. The legal basis for a new judicial mechanism would depend upon the particular option chosen, but in general terms it would be either a Security Council resolution adopted under Chapter VII of the Charter of the United Nations, or an agreement negotiated between the United Nations and the State or States concerned. In the latter case, the process would be triggered by a Security Council resolution requesting the Secretary-General to enter into discussions and negotiations with the State or States, and to report further to the Council. To determine what kind of United Nations

participation there should be in the judicial mechanism, the key first step would be to assess the needs of the mechanism and/or the State or States concerned.

Jurisdiction

39. The crime that would form the basis of the judicial mechanism's jurisdiction would be piracy as defined in article 101 of the United Nations Convention on the Law of the Sea, which reflects customary international law. This crime would need to be reflected in the national law of the host State, or in the jurisdiction of the new mechanism, depending upon the option in question. It would need to be determined whether the jurisdiction should also include the crime of armed robbery at sea. As a crime that takes place within the territorial sea of a State, it is not defined under international law, but in the national jurisdictions of individual States, and naturally falls within the jurisdiction of the territorial State where the crime takes place. If this crime were to be included within the jurisdiction of a new judicial mechanism, therefore, it would need to be determined whether the crime should be limited to acts taking place within the territorial sea of Somalia, or should extend, for example, to acts taking place within the territorial sea of the host State or other regional States. In any of these cases, the question of the consent of the territorial State would arise.

Primacy or complementarity

40. A further important consideration is whether any new judicial mechanism should have primacy over national jurisdictions or whether the principle of complementarity should apply. In respect of acts of piracy on the high seas, or in areas beyond the territorial jurisdiction of any State, all States have jurisdiction under the United Nations Convention on the Law of the Sea and customary international law to apprehend suspected pirates and to prosecute them. Moreover, there may be, for example, strong reasons for a particular State to assert jurisdiction, e.g., where its nationals, or a vessel flying its flag, are victims of an act of piracy. In respect of acts of armed robbery at sea, which take place within the territorial sea of a State, it might be natural for the territorial State to wish to have the first option of prosecuting.

41. In the light of the foregoing, and considering that there are large numbers of suspects, it would need to be considered whether a new judicial mechanism with United Nations participation should have primacy over national jurisdictions. The application of the principle of complementarity may be more appropriate. In that case, a new judicial mechanism would have jurisdiction only if there were no State willing and able to investigate and prosecute. Given the circumstances in which suspects are apprehended at sea and transferred by naval ships, real practical difficulties may face the judicial mechanism in making a rapid determination of whether there are any States willing and able to investigate and prosecute.

Geographic limits of jurisdiction

42. Defining the geographic limits of the jurisdiction of the judicial mechanism would be essential if its jurisdiction were not to be global. Security Council resolution 1918 (2010) refers to acts of piracy and armed robbery at sea off the coast of Somalia, but that general reference would not be sufficient to determine the geographic limits of the criminal jurisdiction of a judicial mechanism. The

possibilities for determining the geographic jurisdiction would include specifying a particular area of the ocean off the coast of Somalia, extending into the Gulf of Aden and out into the Indian Ocean, delimited by coordinates of longitude and latitude. Acts of piracy have now taken place up to 1,200 nautical miles from the coast, and therefore, if all such acts are to be within the jurisdiction of any judicial mechanism, the area delimited would need to be extremely large.

43. An alternative for limiting the geographical jurisdiction, discussed by Working Group 2, was to define it in terms of acts of piracy or armed robbery at sea that originate in Somalia. Although this approach may appear to be a possibility, the difficulties of defining the elements that determine whether an act originates in Somalia would be considerable. Such definition would require proof of the origin of an act in order for a judicial mechanism to assert jurisdiction.

Temporal jurisdiction

44. A new judicial mechanism would also require temporal limits on its jurisdiction. This would include a commencement date. One of the questions that arose in the context of Working Group 2 on legal issues of the Contact Group on Piracy off the Coast of Somalia was whether a judicial mechanism could prosecute crimes that occurred before its establishment. It is evident from the experience of the existing tribunals that in principle this is the case. In relation to established crimes, such as piracy, there would be no risk of the mechanism prosecuting acts that were not crimes at the time when committed. If the judicial mechanism were to have jurisdiction over any newly formulated crimes, care would be needed to ensure that the new mechanism did not prosecute acts that took place prior to the establishment of the mechanism and its jurisdiction, which could be contrary to the principle of *nullum crimen sine lege*. It is difficult to envisage at this stage an end date for the temporal jurisdiction of such a judicial mechanism. This issue may need to be resolved in the future, in the context of consideration of a completion and residual strategy, and taking into account Somalia's future capacity to conduct prosecutions itself.

Personal jurisdiction

45. There are hundreds of piracy incidents happening off the coast of Somalia each year, each involving a number of individuals. If the jurisdiction of a new mechanism were to extend to all apprehended suspects, its capacity to prosecute potentially large numbers would be key. A critical difference between the existing tribunals and a possible judicial mechanism for piracy and armed robbery at sea off the coast of Somalia is that the existing tribunals first investigate and decide whether to issue an indictment before issuing an arrest warrant and requesting the transfer of the suspect to the tribunal. Any potential host State and/or judicial mechanism would therefore need to consider whether it should be obliged to receive all such suspects from patrolling naval States, or whether it would either have a right of refusal of particular transfers, or could place a limit on the total numbers of suspects received in any given time period.

Juveniles

46. A significant number of suspects apprehended may be, or may claim to be, juveniles. The Security Council would need to consider whether special provision

should be made for their treatment. If the precedent of the statute of the Special Court for Sierra Leone[30] were followed, a new judicial mechanism would not have jurisdiction over anyone who is under the age of 15 at the time of the alleged commission of the offences. The requirement would be that those between the ages of 15 and 18 at the time of the alleged commission of the offences are treated with dignity and a sense of worth, and in accordance with international human rights standards, in particular the rights of the child. Account should be taken as far as possible of the desirability of promoting rehabilitation and reintegration, and avoiding imprisonment. Many suspects apprehended have no identification papers, and sometimes no precise knowledge of their own age. There may be real practical difficulties, therefore, in determining their age with any certainty.

Time necessary for the establishment and commencement of functioning

47. Experience of the existing United Nations and United Nations-assisted tribunals[31] demonstrates that the time necessary for the establishment and the commencement of functioning of any judicial mechanism after a mandate has been given by a political organ of the United Nations varies, and may be considerable. This period has varied from around one year to around nine years until the commencement of functioning. Discussions in Working Group 2 suggested that the speed of setting up any new mechanism would be a key consideration. Although the view was expressed in those discussions that establishing a special chamber within a national jurisdiction might be among the most rapid options, United Nations experience suggests that this is not necessarily the case. The shortest timelines were achieved when the Security Council established ICTY and ICTR as subsidiary bodies.[32]

Costs and financing

48. Experience has demonstrated that considerable political and financial commitment by States is necessary to establish and sustain a new judicial mechanism.[33] Costs of the existing tribunals and other judicial mechanisms have ranged from around $14.3 million (the East Timor Special Panels for a biennium)[34] to $376.2 million (ICTY for a biennium).[34] The most expensive have been ICTY and ICTR, which are international tribunals that have prosecuted relatively large numbers of indictees charged with complex international crimes. Mechanisms based in the national jurisdiction of a State have proved relatively less expensive. Potential costs were a key concern raised within Working Group 2.

49. The fact that the crimes of piracy and armed robbery at sea are not complex international crimes may mean that proceedings are shorter than those in the existing tribunals and special chambers. However, the high numbers of suspects and the ongoing nature of the problem will have an impact on the costs and the potential duration of any new judicial mechanism. Further, although the crimes are not complex, experience has shown that there may be difficult evidentiary challenges to overcome when evidence is gathered by a patrolling naval State and transferred to a

[30] See annex I for more details on the Special Court for Sierra Leone.
[31] See annex I.
[32] See annex I for more details on the time needed to establish the various existing tribunals.
[33] For Special Panels in East Timor, see annex I.
[34] For ICTY, see annex I.

regional prosecuting State. This evidentiary factor may have an impact on the costs and success of any new judicial mechanism.

50. The basis of funding would also be an important consideration. Funding from United Nations assessed contributions would spread the financial burden, and provide predictable financing that enables forward planning. The responsibility of financing voluntarily funded tribunals has in practice fallen on a relatively small group of States, and has given rise to management challenges when funds run low. Sufficient and sustained financial commitment by States is one of the key issues that would need to be considered in establishing any new judicial mechanism. Some of the existing tribunals have requirements for contributions to the funding by the affected State. In the situation of piracy and armed robbery at sea off the coast of Somalia, many States, particularly regional States, and the international community as a whole, are affected. Any State that is willing to host a new judicial mechanism would, in fact, be taking on a task that is to the benefit of the international community. There may therefore be strong grounds for the view that any willing host State should not have to bear unreasonable financial costs nor other burdens.

51. The current bilateral arrangements between certain patrolling naval States and the European Union and Kenya and Seychelles demonstrate that financing may in practice be provided by those States and organizations that are able to transfer suspected pirates for prosecution under such arrangements.[35] If a new judicial mechanism were to enter into arrangements to receive suspects from patrolling naval States and organizations, it should be considered whether such transfers of suspects should be linked to financing by those States and organizations. A further issue that was discussed in Working Group 2 was the possibility of the shipping industry contributing to the costs of furthering the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia. The terms of reference of the International Trust Fund were drafted to allow for this.[36]

52. As the costs of even the least expensive of the options for a judicial mechanism are significant, it is clear that using the International Trust Fund to finance any such mechanism may risk severely depleting it. Consideration would therefore need to be given as to how to protect funds in the International Trust Fund intended for supporting national prosecution and imprisonment projects. Further, insofar as the International Trust Fund is used for projects to strengthen the rule of law in Somalia, allowing its use to finance a new judicial mechanism would risk drawing funds away from addressing the cause of Somalia's instability, to deal with a symptom of that instability.

Cooperation

53. An additional major consideration would be the need for any new judicial mechanism, or in the case of a special chamber within a national jurisdiction, the host State, to negotiate and enter into agreements with third States on enforcement of sentences, and the relocation of those acquitted, and of witnesses, if necessary.[37]

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[35] It is understood that there is no such requirement in the bilateral transfer arrangements, but that in practice the naval States fund technical assistance and capacity-building in the receiving States.

[36] Although, notably, no such contributions have yet been received by the International Trust Fund.

[37] The United Nations would not participate in any national jurisdiction or new judicial mechanism that imposes the death penalty.

Sentence enforcement agreements would most appropriately be concluded with States in the region, ideally close to or within Somalia. Any judicial mechanism with United Nations participation would need to ensure that prison conditions would be to international standards, and that enforcement agreements between the judicial mechanism or host State and third States contain provisions to this effect, and for the protection of human rights. It would need to be considered whether the prisons being developed in the Puntland and Somaliland regions of Somalia with UNDP and UNODC assistance will meet international standards. Enforcement agreements should provide for the monitoring of their implementation in third States by the mechanism or host State. Agreements would also be required between the judicial mechanism or host State and the patrolling naval States to provide a legal basis for the transfer of suspects to the mechanism, to deal with the transfer of evidence to the mechanism, and to provide for the protection of the human rights of those apprehended, detained at sea and transferred.

Completion and residual issues

54. The political and financial commitment needed for the establishment and functioning of a judicial mechanism does not end with the closure of that mechanism. Experience of the existing tribunals demonstrates that there are certain essential functions that must continue beyond the life of any criminal judicial mechanism. These include the supervision of enforcement of sentences, the review of judgments, the continued protection of witnesses, and management of the archives. These are potentially long-term functions that may require some form of residual mechanism to succeed the judicial mechanism. These functions could well require continued United Nations participation with a view to ensuring that they are carried out to international standards. Even in the options that are based in a national jurisdiction, where the court or special chamber will continue indefinitely, the termination of United Nations participation at some stage would be likely to require a continued United Nations presence after that termination to monitor the carrying out of the functions to international standards.

B. Consideration of options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia

Option 1: The enhancement of United Nations assistance to build capacity of regional States to prosecute and imprison persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia

Political support

55. Option 1 is already ongoing and has achieved some success. Kenya's opening of a new high security courtroom, built by the UNODC Counter-Piracy Programme, will enhance Kenya's capacity to conduct piracy prosecutions and prosecutions of other serious criminal offences. Strong political support for the roles played by Kenya and Seychelles has been important, and will be key as their cooperation with the international community continues to develop. To increase capacity to prosecute the large number of suspects apprehended by patrolling naval States, more States in the region should be encouraged to receive transfers of suspects for prosecution. This will require political engagement with regional States by the international

community, including potentially through the Contact Group on Piracy off the Coast of Somalia. While assistance programmes for Kenya and Seychelles are adequately funded for the next year, further funding will be necessary to ensure that these programmes can continue and that assistance can be extended to other States in the region that are willing to accept the transfer of suspects for prosecution. It will be essential that the attention of the international community on this problem is sustained, and that financial support continue.

Advantages and disadvantages

56. One of the main advantages of option 1 is that it is already functioning and has demonstrated that it is effective. Prosecutions of nearly 600 suspected pirates have been conducted, or are ongoing, in 10 national jurisdictions over the past two years. This capacity compares favourably with the existing tribunals. National trials are also relatively rapid, taking around 12 to 18 months to complete from the time of arrest. The financial costs of assistance to national trials and imprisonment are modest compared to the costs of any of the other options. Assistance to national jurisdictions benefits the criminal justice system of the State as a whole, not only piracy prosecutions. Achieving this in Somalia over the longer term is likely to be key to enabling Somalia to play a role in the solution to piracy and armed robbery at sea off its coast. The other options all involve new judicial mechanisms, even where based in a national jurisdiction, and may tend to draw resources and experience from the existing national criminal justice systems.

57. Possible disadvantages of this option include the fact that patrolling naval States do not know at the time of apprehending suspects at sea whether they will be able to transfer them to a prosecuting State. The most common reason for the release of suspects is lack of sufficient evidence to support prosecution, rather than lack of a regional State to accept them. This may, however, also be a disadvantage in relation to any of the other options below, and guidance on the collection and the transfer of evidence to any new mechanism is likely to be required. Not all patrolling naval States have arrangements for transfer of suspects to regional States, and thus may adopt policies of disarming and releasing them at sea. The establishment of a new judicial mechanism under any of the options below may open possibilities for further patrolling naval States to enter into arrangements for the transfer of suspects for prosecution. The fact that current arrangements for the transfer of suspects depend on only two regional States makes the situation vulnerable if political circumstances change. There is a need to increase the number of regional prosecuting States, and to share the burden of both prosecution and imprisonment.

Cooperation

58. To assist the regional States conducting prosecutions, and to encourage further regional States to accept the transfer of suspects for prosecution, urgent attention is required to address the problem of imprisonment of the large numbers convicted, who are mainly Somalis. Additionally, those not prosecuted and those acquitted should be repatriated. To address this problem, third States willing to accept such persons should be identified and assistance provided, as needed, to improve prison conditions. Ideally, Somalia should receive the majority, and, to this end, UNODC and UNDP are providing assistance to improve standards of prisons in the Puntland and Somaliland regions of Somalia. Agreements between the prosecuting States and

third States, principally Somalia, will need to be concluded for this purpose. Continued financing for these projects is essential if the problem of imprisonment in the region is to be effectively addressed.

59. Agreements on the enforcement of sentences concluded by the existing tribunals are on a request and acceptance basis in relation to any specific case. There is no obligation to accept any particular convicted person, nor indeed to accept any at all. Given the large numbers of persons convicted, it is not clear that such agreements would be effective to relieve the burden on the prosecuting States, and to encourage further States to accept suspects for prosecution. One issue for consideration, therefore, is whether agreements for the enforcement of sentences with third States, and in particular Somalia, should oblige these States to receive all of those put forward for imprisonment.

The role of Somalia

60. A long-term solution to the problem of prosecuting and imprisoning those responsible for acts of piracy and armed robbery at sea should lie in Somalia itself. The regions of Puntland and Somaliland are conducting prosecutions, and imprisoning, but significant assistance is needed to improve standards. Currently, far less financing is provided for assistance programmes in Somalia than for Kenya and Seychelles. Donors have sufficient confidence in trials and imprisonment in Kenya and Seychelles to direct their financing to those States, but given the fractured nature of the law on piracy within Somalia, and significant issues concerning Somali judicial and prosecutorial capacity, appear at this stage not to have sufficient confidence to direct the same level of financing to Somalia. Although the regions of Puntland and Somaliland face significant challenges in meeting international standards, it may be preferable for the international community to increase its funding to assist Somalia to achieve international standards rather than to risk any decline in Somalia's efforts to investigate and prosecute piracy itself.

Security Council

61. The Security Council may wish to consider continuing, and building on, the role it has played in its resolutions[38] to enhance option 1, as follows:

(i) Commending Kenya, Seychelles and other States engaged in prosecutions for their role;

(ii) Commending the work of UNODC and UNDP in assisting States in the region to conduct prosecutions and to imprison those convicted;

(iii) Commending the work of the Contact Group on Piracy off the Coast of Somalia in leading and coordinating international efforts on prosecution and imprisonment of acts of piracy, and encouraging further such work;

(iv) Commending patrolling naval States for their role in suppressing acts of piracy, and encouraging them to work with UNODC and regional States to ensure that evidence collected is sufficient to provide a sound basis for prosecutions;

[38] See Security Council resolutions 1816 (2008), 1846 (2008), 1851 (2008), 1897 (2009) and 1918 (2010).

(v) Urging further States in the region to accept the transfer of suspects from patrolling naval States for prosecution;

(vi) Urging all States, in particular flag, port and coastal States, and States of the nationality of victims and perpetrators, to conduct prosecutions;

(vii) Calling upon all States to ensure that they have the relevant jurisdiction, offences, and procedures to enable them to prosecute acts of piracy off the coast of Somalia;

(viii) Encouraging States to consider the financing of assistance to States in the region, including through the International Trust Fund, to conduct prosecutions and to imprison those convicted;

(ix) Encouraging States to consider financing assistance, including through the International Trust Fund, to enhance the standards of prosecution and imprisonment in Somalia and its regions;

(x) Encouraging the shipping industry to contribute to the International Trust Fund.

Option 2: The establishment of a Somali court sitting in the territory of a third State in the region, either with or without United Nations participation

62. An option not specifically mentioned in Security Council resolution 1918 (2010), but discussed in the Contact Group on Piracy off the Coast of Somalia,[39] would be a Somali court sitting in the territory of another regional State, either with or without participation by the United Nations.[40] Such a court, like the Lockerbie court,[41] would be an example of a national court exercising its national jurisdiction, but sitting in the territory of a third State. The national jurisdiction in this event would be that of Somalia, not the host State. The host State would be providing a secure environment for the trials to take place under Somali law. The necessary arrangements to enable such a court to be established would be a matter for Somalia and the host State to negotiate. If it were established with participation by United Nations selected judges, prosecutors and/or staff, this would also require agreement between the United Nations, Somalia and the host State.

63. Ideally, the host State should be in the region, so that it would have the advantage of proximity for the purpose of the transfer of apprehended suspects by patrolling naval States, and the transfer of those convicted to third States for imprisonment. Identifying such a host State may present challenges. That State would be providing all facilities necessary for the Somali court to function in its territory, without necessarily receiving any capacity-building benefits for its own criminal jurisdiction.

[39] As raised by Portugal in a non-paper during the Working Group 2 discussions and the informal meetings hosted by the Netherlands and by France in a non-paper at meeting of the Contact Group on 10 June 2010.

[40] A member of the Contact Group has informally floated the idea of possible European Union support to such a Somali court or special chamber.

[41] The Lockerbie court did not have participation by the United Nations or a regional organization.

Advantages and disadvantages

64. This option would have the advantage of assisting in the strengthening of the Somali judiciary, thereby contributing to the long-term efforts to achieve peace and stability in Somalia. Although in principle such an option might be expected to be among the most cost-effective, similar to the special chamber options below, in practice, the extent of United Nations assistance likely to be necessary would be considerable. Costs would therefore be likely to be higher than the special chamber options, and the time necessary for the court to commence functioning may be significantly longer.

65. Discussions in Working Group 2[42] raised significant issues concerning the adequacy of Somalia's piracy laws and the capacity of Somalia's judicial system. Although such option would have the advantage of enabling Somalia to play a direct part in the solution to prosecuting acts of piracy, it may not be a possibility at present. This conclusion is also supported by the findings of the assessment mission to the region of Working Group 1 of the Contact Group on Piracy off the Coast of Somalia.[43] Further, UNDP has underlined in Working Group 2 the wide range of challenges that the Somali judicial system continues to face.[44] Although there is some judicial capacity in Somalia and among the Somali diaspora, the challenge of establishing a Somali court meeting international standards in a third State would be considerable at present. Further, any advantages that such a court may enjoy would be outweighed if it were to draw limited judicial resources from Somalia's courts.

Cooperation and residual issues

66. As a Somali national court, sentences would most naturally be enforced in Somalia. However, for capacity reasons, enforcement agreements with third States may still be necessary. In addition, as a national court exercising national jurisdiction, there would be no question of a need for a residual mechanism to carry out residual functions.

The role of Somalia

67. For this option to be feasible, the issues above would need to be addressed. It could be borne in mind at such time in the future as Somali judicial capacity is sufficiently strengthened. It would need to be considered at that time whether it would be preferable to attempt to establish a Somali court in the territory of a third State, or to focus on working towards the long-term goal of assisting courts sitting in Somalia to meet international standards, and to receive the transfer of suspects from patrolling naval States.

[42] See annex II.

[43] See the report of Working Group 1 of the Contact Group entitled "Regional Counter-Piracy Capability Development Needs Assessment and Prioritization Mission to East Africa and the Gulf of Aden", p. 12 (20 October 2009) (unpublished).

[44] See conclusions of the Chairman of Working Group 2 of the Contact Group on Piracy off the Coast of Somalia, 5th meeting (Copenhagen, 17-18 May 2010).

Option 3: The establishment of a special chamber within the national jurisdiction of a State or States in the region, without United Nations participation

68. This option would involve a State or States in the region setting up a special court or chamber within its national court structure to prosecute acts of piracy and armed robbery at sea off the coast of Somalia. This option would not involve participation by United Nations selected judges, prosecutors and/or staff, but is likely to need technical assistance from UNODC and other relevant United Nations offices. It would therefore not require any mandate from a political organ of the United Nations or the negotiation of an agreement with the State concerned.

69. None of the regional States conducting prosecutions has a special chamber to deal with piracy and armed robbery at sea. As noted above, Kenya has opened a new high security courtroom in Shimo La Tewa, Mombasa. This courtroom will be used for piracy trials, but also trials of other crimes, and thus would not be a special chamber for piracy prosecutions. One consideration would be whether there are, or could potentially be, sufficient piracy prosecutions to justify a special chamber exclusive to piracy. Even in Kenya, which has 12 ongoing piracy prosecutions, the new courtroom at Shimo La Tewa will not be exclusive to piracy prosecutions. The regional State where the volume of prosecutions might justify a special chamber is Somalia. The courts in Puntland and Somaliland regions of Somalia handle piracy cases more regularly than any other State conducting prosecutions.

Advantages and disadvantages

70. A host State in the region would have the advantage of proximity for the purpose of the transfer of apprehended suspects by patrolling naval States, and the transfer of those convicted to third States for imprisonment. This option is likely to be among the most cost-effective, and would have the further advantage of being within an existing and functioning jurisdiction, with established crimes and criminal procedures. United Nations assistance to the State may help it to consider whether any improvements or amendments to the law are necessary, e.g., to determine the geographic limits of the jurisdiction, or to introduce crimes of financing or organizing acts of piracy and armed robbery at sea. An important question would be whether the jurisdiction should extend to offences committed within Somalia's territorial sea, and the need for Somalia's consent.

71. A possible risk may be that the special chamber would draw resources from the criminal justice system more broadly, and may lead to a risk of "two-tier justice" if the standards of fairness and efficiency in the special chamber exceed those of other criminal courts. A further disadvantage may be limited capacity of such a chamber.

Cooperation and residual issues

72. If the host State is not Somalia, it would be critical for it to negotiate and conclude agreements with other States for the enforcement of sentences. Arrangements or agreements would also be necessary between the host State and the patrolling naval States to provide a legal basis for the transfer of suspected pirates, the transfer of evidence, and also for the protection of the rights of the detainees. Important considerations would include whether the host State should be obliged to receive transfers from patrolling naval States, whether the host State should have the option of refusing any particular transfer, or whether there should be limits on the

numbers transferred in any given time period. As the special chamber would be within the national jurisdiction of a State, without United Nations participation, there would be no question of a completion or residual strategy.

Option 4: The establishment of a special chamber within the national jurisdiction of a State or States in the region, with United Nations participation

73. This option for a special chamber within a national jurisdiction might, for example, involve the participation of United Nations selected judges within that chamber, United Nations selected prosecutors and/or staff. The legal basis for United Nations participation in a special chamber within a national jurisdiction would be an agreement between the United Nations and the host State. Implementing legislation by the host State may well be required. If the host State were one of those that is already conducting prosecutions, such as Kenya and Seychelles, there would be an additional advantage of drawing on their growing expertise.

74. The United Nations would first need to determine with the host State what form of international participation it would accept. This would include taking fully into account not only its capacity-building needs, but also its culture and legal traditions. Experience has demonstrated that, in circumstances where international participation is needed, it is likely to go beyond participation by judges in trial chambers, and extend to a more comprehensive approach involving prosecutors and/or staff. United Nations experience further shows that where a State has accepted participation by international judges, a framework should be established under which international standards of fair trial can be attained. A way of achieving this in practice has been to ensure that the international judges are in the majority in the chambers in which they sit, so that their contribution to the process and decision-making is effective. If, over time, the capacity of the national components of the special chamber is sufficiently enhanced and international standards are met, the international components may be phased out.

75. It is not clear how such participation by United Nations selected judges would work in the context of, for example, Kenya and Seychelles, or the United Republic of Tanzania and Mauritius. Even if these States were willing to accept international participation, they are all common law jurisdictions that conduct trials with a single judge. United Nations participation could not, of course, be to the exclusion of national judges. A special chamber with United Nations participation might, therefore, entail a departure from the normal structure of criminal proceedings in the host State. Care would be needed to ensure that, if international prosecutors and staff are deployed, these are limited to the needs of the host State, and there is no replication of international and national efforts, which would add to the costs. Ideally, the international judges, prosecutors and/or staff should aim to impart their knowledge and expertise so that in the longer term, their positions could be phased out and taken by nationals.

Advantages and disadvantages

76. A host State in the region would have the advantage of building on an existing judicial system with an established jurisdiction, including crimes and criminal procedures. Further, it would have the advantage of proximity for the purpose of the transfer of apprehended suspects by patrolling naval States, and the transfer of those convicted to third States for imprisonment. In addition to technical assistance already

provided to regional prosecuting States, United Nations participation within a national jurisdiction, if needed, would help to build capacity in that jurisdiction. Further, if United Nations selected judges, prosecutors and/or staff for deployment in a special chamber included individuals drawn from other States in the region, this would enhance regional capacity-building. If it were possible for Somali judges, prosecutors, and/or staff to be among those selected, this would also help to strengthen Somalia's judicial system, and form part of the long-term efforts to achieve peace and stability in Somalia. As with option 3, another advantage is that the special chamber would be established within an existing and functioning jurisdiction. It is also likely to be among the most cost-effective options, however, probably less cost-effective than option 3, which has no United Nations participation.

77. A possible risk may be that the special chamber would draw resources from the host State and other regional States. Moreover, a disadvantage may be the limited capacity of such a chamber to prosecute large numbers. Similar to option 3, a risk may be that financing and assistance are drawn away from the host State's criminal justice system more broadly, leading to "two-tier justice". The same question whether the jurisdiction should extend to offences committed within Somalia's territorial sea and the need for Somalia's consent would arise. Its capacity to prosecute large numbers may be similarly limited, and the same important decision would be needed as to whether the host State should be obliged to receive transfers from patrolling naval States, or should be able to limit the numbers of suspects received.

Cooperation and residual issues

78. A bilateral agreement between the United Nations and the host State would not provide a vehicle for agreeing cooperation and burden-sharing among States. The host State would need to negotiate and conclude agreements with other States dealing with enforcement of sentences. Arrangements or agreements would also be necessary between the host State and the patrolling naval States to provide a legal basis for the transfer of suspected pirates, the transfer of evidence, and the protection of the rights of the detainees.

79. As the special chamber would be within the national jurisdiction of a State, and there is currently no foreseeable end to the ongoing problem of piracy and armed robbery at sea off the coast of Somalia, it would be a matter for the host State to determine whether the special chamber should have a limited lifespan, or should be of indefinite duration. In the event that the host State does set a finite limit on the life of the special chamber, a completion and residual strategy would be necessary. If the host State does not set a limit on duration of the special chamber, the special chamber would not need a completion and residual strategy, but some form of continued United Nations presence may be necessary with a view to ensuring that international standards are maintained.

Option 5: The establishment of a regional tribunal on the basis of a multilateral agreement among regional States, with United Nations participation

80. A regional tribunal established on the basis of a multilateral agreement among States in the region should, ideally, include participation by Somalia. The agreement would provide the legal basis for the establishment of the regional tribunal, and would set out its jurisdiction. If United Nations assistance or participation is needed

and requested, discussion with the regional States would be necessary to determine whether it should be limited to technical assistance, or should also involve participation by United Nations appointed judges, prosecutors and/or staff. All such discussions should be held in close consultation with the African Union.

81. For the United Nations to participate in such a regional tribunal would require a Security Council resolution to request the Secretary-General to participate in negotiations with the regional States with a view to becoming parties to the multilateral agreement. The United Nations would need to determine with the regional States what form of international participation the tribunal would need. Although experience has demonstrated that, in circumstances where international participation has been provided for, there should be a framework within which international standards may be attained, normally through United Nations selected judges being in the majority, it would need to be considered whether this would be appropriate in a regional tribunal.

Advantages and disadvantages

82. This option would have the advantage of capacity-building in the region if judges, prosecutors and/or staff were drawn from jurisdictions in the region. If it were possible for this to include Somali nationals, it would also help to strengthen Somalia's judicial system and form part of the long-term efforts to achieve peace and stability in Somalia. As a tribunal based in the region, it would have the advantage of proximity for the purpose of the transfer of apprehended suspects by patrolling naval States, and the transfer of those convicted to third States for imprisonment.

83. As a new judicial mechanism, a regional tribunal would not be within an existing jurisdiction, with established crimes and procedures. The tribunal would not be able to benefit, for example, from the expertise built up by the judicial systems in Kenya and Seychelles, because it would not be embedded in either of those jurisdictions. It could only benefit from that expertise if it were to draw judges, prosecutors and/or staff from those jurisdictions. This, however, may deplete the expertise of Kenya and Seychelles and inhibit their capacity to prosecute nationally.

84. The multilateral agreement establishing the regional tribunal would need to set out the crimes, and any geographic limits on jurisdiction. The crime of piracy is well established under the United Nations Convention on the Law of the Sea and customary international law and should not present a difficulty of definition. However, if the jurisdiction were to include crimes of financing and organizing acts of piracy and armed robbery at sea, which are not established under the Convention, definitions would need to be negotiated among the participating States, and the United Nations if participating.

85. Unlike a special chamber within a national jurisdiction, a regional tribunal would not have a pre-existing territorial jurisdiction. The participating States and the United Nations would need to determine the geographic limits of the jurisdiction, and whether the territorial seas of the participating States, possibly including Somalia, should be within the jurisdiction or not. Given the large numbers of potential suspects to be prosecuted, a regional tribunal may have the advantage of greater human and financial resources, and therefore possibly greater capacity, compared to a special chamber within a national jurisdiction. Nevertheless, it would still be important for the participating States, and the United Nations, if

participating, to determine whether the tribunal should be obliged to receive transfers of suspects from patrolling naval States, or should be able to limit the number of suspects received.

86. A regional tribunal is unlikely to be as cost-effective as a special chamber within a national jurisdiction. The recruitment in the region and internationally of judges, prosecutors and/or staff would either need to be based on the United Nations common system for staffing and salary levels, or an appropriate regional equivalent. The tribunal, as a new institution, may need premises and incur other costs that a special chamber within a national jurisdiction would not have.

Cooperation and residual issues

87. A multilateral agreement among regional States would provide a vehicle for agreeing on cooperation and burden-sharing among those States. If one of the participating States is also the host State of the regional tribunal, the multilateral agreement may provide the basis upon which that State obtains the agreement of the others to enforce sentences in their territories. This, of course, would complicate the negotiations and could well add to the time necessary for its conclusion. As was noted in the Contact Group on Piracy off the Coast of Somalia, the time required to negotiate the appropriate multilateral agreement might be considerable.

88. While a multilateral agreement among the regional States may provide the basis for cooperation and burden-sharing among them, it would not provide any basis for requiring cooperation from third States. Arrangements between the regional tribunal and the patrolling naval States would be necessary to provide a legal basis for the transfer of suspected pirates, and could also regulate the transfer of evidence to the tribunal and minimum standards for the treatment of those detained and transferred. Such arrangements might also provide for patrolling naval States to contribute to the financing of the tribunal.

89. As it is unlikely that the regional States would wish to establish a regional tribunal indefinitely, a completion and residual strategy would need to be developed at some stage. Some form of residual mechanism would be needed to carry out the residual functions after the closure of the tribunal. If there were United Nations participation in such tribunal, it would be likely to continue beyond the life of the tribunal with a view to ensuring that international standards are maintained.

Option 6: The establishment of an international tribunal on the basis of an agreement between a State in the region and the United Nations

90. In order to establish an international tribunal through an agreement between the United Nations and a State, the Security Council would need to request the Secretary-General to negotiate and conclude an agreement with an identified State. This would lead to the establishment of a United Nations-assisted tribunal with national participation, on the lines of the Special Court for Sierra Leone and the Special Tribunal for Lebanon.[45] Implementing legislation may well be needed in the host State. The agreements to establish the existing United Nations-assisted tribunals have all been concluded with the affected State. It would follow that this option would most naturally be pursued with Somalia, as the State in which the

[45] For discussion of the Special Court for Sierra Leone and the Special Tribunal for Lebanon, see annex I.

problem of piracy originates. However, the fractured nature of the law in Somalia, and significant issues concerning Somali judicial and prosecutorial capacity, mean that Somali participation in a United Nations-assisted tribunal may not be a possibility at present, as set out in option 3. This option would therefore most appropriately be pursued with a third State, ideally in the region, that would also be the host State. Given that such a State would in practice be only one of many States affected by the problem of piracy and armed robbery at sea, whether to seek to establish such a tribunal rather than pursuing options 3 or 4, involving the establishment of a special chamber within a national jurisdiction, would require careful assessment.

Advantages and disadvantages

91. A tribunal under this option would typically include the participation of both United Nations selected judges and national judges, international and national prosecutors, and would in practice include international and national staff. This would have the advantage of capacity-building in the host State, although perhaps to a lesser extent than option 4. If the host State were one of those that is already conducting prosecutions, such as Kenya and Seychelles, there would be an advantage of drawing on their growing expertise. However, that goal may be more effectively achieved through pursuing options 3 or 4 with either of those States, if they were willing to accept a special chamber. There may, in that event, be no particular advantage in a United Nations-assisted tribunal, which may be likely to be more time-consuming to establish and less cost-effective. Regional capacity-building through the participation of judges, prosecutors and/or staff from other jurisdictions in the region would be beneficial, but would perhaps be unlikely under this option unless there were a clear benefit to the host State.

92. As with option 4, experience has demonstrated that if United Nations participation is necessary, it is likely to go beyond judges in trial chambers, and to extend to a more comprehensive approach involving prosecutors and/or staff. Moreover, to establish a framework under which international standards of fair trial can be attained, it may be that United Nations judges would need to be in the majority in the chambers in which they sit, so that their contribution to the process and decision-making is effective. Unlike option 4, there would be no phasing out or passing of control to the national judges over time in a United Nations-assisted tribunal.

93. Whether or not the agreement to establish such a tribunal should incorporate aspects of the national law of the host State in order to set out the jurisdiction, including the crimes, would be a matter for discussion and negotiation between the host State and the United Nations. If the crimes established under national law are not incorporated into the jurisdiction of the tribunal, they would need to be defined in the agreement. Further, if crimes of financing and organizing were to be included within the tribunal's jurisdiction, they would need to be defined in the agreement, unless appropriate offences are already established in the national jurisdiction. The agreement would need to set out the geographic limits of the tribunal's jurisdiction, and whether it would include the territorial sea of the host State. If the agreement were not concluded with Somalia, another important point would be whether the jurisdiction should extend to offences committed within Somalia's territorial sea, and the need for Somalia's consent.

94. A United Nations-assisted tribunal may well have greater human and financial resources, and therefore capacity, to prosecute large numbers of suspects than does a special chamber within a national jurisdiction. However, given the large numbers of suspects, it would still be important to decide whether the tribunal should be obliged to receive transfers from patrolling naval States, or whether it should be able to limit the number of suspects received.

Cooperation and residual issues

95. A bilateral agreement between the United Nations and a State would not provide a vehicle for agreeing on cooperation and burden-sharing with third States. The tribunal would need to negotiate and conclude agreements with third States, ideally in the region, for the enforcement of sentences. Arrangements or agreements would also be necessary between the tribunal and the patrolling naval States to provide a legal basis for the transfer of suspected pirates, the transfer of evidence, and also for the protection of the rights of the detainees.

96. Unless the United Nations is prepared to establish a United Nations-assisted tribunal for an indefinite period, a completion and residual strategy would be needed at some stage, including the establishment of a residual mechanism to carry out the residual functions of the tribunal after its closure.

Option 7: The establishment of an international tribunal by Security Council resolution under Chapter VII of the Charter of the United Nations

97. For the Security Council to establish an international tribunal as a subsidiary body would require a resolution or resolutions adopted under Chapter VII of the Charter of the United Nations. A preliminary question for the Security Council to consider, therefore, would be whether acts of piracy and armed robbery at sea off the coast of Somalia constitute a threat to international peace and security in the region such that the Council would be acting under Chapter VII. The existing Security Council resolutions[46] determine that the situation in Somalia constitutes a threat to international peace and security in the region, and that incidents of piracy and armed robbery at sea exacerbate that situation.

Advantages and disadvantages

98. If the Security Council does act under Chapter VII to establish a tribunal, it would be entirely international, with all of its judges, prosecutors and staff selected by the United Nations. However, the tribunal might nevertheless serve a capacity-building function if at least some of the United Nations selected judges, prosecutors and staff were from the region. Ideally, this would include Somali nationals. It would be beneficial for the tribunal to draw on the expertise built up, for example, in Kenya and Seychelles, but recruitment from those jurisdictions may have the disadvantage of inhibiting their capacity to prosecute nationally. In addition, it would be advantageous if the international tribunal were located in the region in order to take advantage of proximity for the purpose of the transfer of apprehended suspects by patrolling naval States, and the transfer of those convicted to third States for imprisonment.

[46] Most recently Security Council resolution 1897 (2009).

99. It would fall to the Security Council to negotiate and adopt a statute governing the tribunal's jurisdiction, including the crimes. The crime of piracy is well established under the United Nations Convention on the Law of the Sea and customary international law and should not present a difficulty of definition. However, if the jurisdiction were to include crimes of financing and organizing acts of piracy and armed robbery at sea, which are not established under the Convention, definitions would need to be negotiated by the Security Council. The geographic limits of the tribunal's jurisdiction, and whether the territorial seas of the regional States, including Somalia, should be within the jurisdiction or not, would have to be determined. As the Council would be acting under Chapter VII of the Charter, it would be able to determine these matters.

100. The temporal limits of the tribunal's jurisdiction would need to be decided, and whether this jurisdiction should extend to all persons committing piracy and armed robbery at sea, or whether it should be restricted to a category of the "most responsible", e.g., those who finance or plan acts of piracy. A related question would be whether, if the jurisdiction is not so restricted, the tribunal should be obliged to accept all transfers of suspects apprehended by patrolling naval States. Compared to a special chamber within a national jurisdiction, an international tribunal under Chapter VII of the Charter would be likely to have greater human and financial resources, and therefore capacity, to prosecute potentially large numbers of suspects.

101. The option of an international tribunal established by the Security Council is not likely to be among the most cost-effective. As a new judicial mechanism, it would require premises, and may incur other such costs that a special chamber within a national jurisdiction may not have. In addition, as a subsidiary organ of the Security Council, it would be required to follow the United Nations common system for staffing and salaries. The total cost would be likely to exceed the costs of a special chamber in a national jurisdiction in the region. The resource implications of the Council establishing a tribunal under Chapter VII would fall to the General Assembly to consider.

102. Security Council action under Chapter VII of the Charter of the United Nations may have the advantage of moving rapidly to the establishment of an international tribunal. However, an assessment of the overall time required in connection with this option would include the time necessary to identify and negotiate with a potential host State.

Cooperation and residual issues

103. The international tribunal would need to enter into agreements for the enforcement of sentences with third States. It would remain to be determined whether the international tribunal should enter into transfer agreements with the patrolling naval States, or whether the Security Council would wish to determine this matter in its resolution under Chapter VII.

104. Unless the Security Council intends to establish a permanent international tribunal, at some stage it would require a completion and residual strategy. A residual mechanism would have to be established to carry out the residual functions following the closure of the tribunal.

C. Further options raised by members of the Contact Group on Piracy off the Coast of Somalia

105. Further options have been raised by members of the Contact Group, but have been considered not to be feasible. The possibility of amending the Rome Statute of the International Criminal Court (ICC) to include the crime of piracy was raised in Working Group 2, but was considered not to be feasible. It is notable that such amendment was not taken up during the first Review Conference of the Rome Statute, which took place in June 2010, in Kampala.

106. Possible amendment of the statute of the International Tribunal on the Law of the Sea was also discussed in Working Group 2 on legal issues of the Contact Group on Piracy off the Coast of Somalia. It is a tribunal established under the Convention, which determines disputes among States arising out of the Convention. As the Convention is a multilateral Convention that took many years to negotiate and to enter into force, amendment was considered not to be feasible.

107. Amendment of the statute of the African Court on Human and Peoples' Rights,[47] located in Arusha, Tanzania, was also raised as a possibility. It is a court that determines African Union States' compliance with the African Charter on Human and Peoples' Rights. To modify its jurisdiction so that it would be able to prosecute acts of piracy and armed robbery at sea off the coast of Somalia would of course require substantial amendment of the treaty basis of the Court by its States parties. This would be a matter for the States of the African Union to consider. It is not apparent that any discussions are ongoing among the States of the region, nor among African States more broadly, to consider such amendment.

VI. Conclusion

108. The Security Council requested the Secretary-General to present a report on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia, including, in particular, options for creating special domestic chambers, possibly with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements, taking into account the work of the Contact Group on Piracy off the Coast of Somalia, the existing practice in establishing international and mixed tribunals, and the time and resources necessary to achieve and sustain substantive results.

109. In response, the Secretary-General has identified seven options for the Security Council to consider. In the absence of a potential host State, these options have been analysed in terms of general considerations that apply. The work of the Contact Group on Piracy off the Coast of Somalia, the existing practice in establishing tribunals, and the time and resources necessary, have also been taken into account.

110. A potential host State would need to be identified for any of the possible new judicial mechanisms. It would be necessary to determine the preferences of that potential host State, including whether it would accept international participation in

[47] It commenced functioning on 25 January 2004 with the ratification by 15 member States of the Protocol to the African Charter on Human and Peoples' Rights.

such a mechanism, and, if so, in what form. The need for sufficient arrangements for imprisonment in the region, ideally in Somalia, is as critical as the options for prosecution. This is particularly so given the large numbers of suspects apprehended by naval States. A new judicial mechanism to address piracy and armed robbery at sea off the coast of Somalia would be addressing a different situation to that addressed by the existing United Nations and United Nations-assisted tribunals. Such a mechanism would face ongoing criminal activity and, potentially, a large caseload, with no predictable completion date.

111. Whichever of the options may be favoured by the Security Council, assisting Somalia and its regions in the longer term to develop the capacity to prosecute and imprison to international standards will be essential in sustaining results in the fight against impunity for those responsible for acts of piracy and armed robbery at sea off the coast of Somalia.

Annex I

Existing practice of the United Nations in establishing and participating in United Nations and United Nations-assisted tribunals, and the experience of other relevant judicial mechanisms

1. The International Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) are subsidiary organs of the Security Council, and therefore are United Nations tribunals. The following are the United Nations-assisted tribunals: the Special Court for Sierra Leone and the Special Tribunal for Lebanon, which are independent international courts with important elements of national participation; and the Extraordinary Chambers in the Courts of Cambodia, which forms part of the national court structure of Cambodia, but has important elements of United Nations participation.

2. The other relevant judicial mechanisms discussed below are the special panels in East Timor, the trial panels in Kosovo, the War Crimes Chamber of the State Court of Bosnia and Herzegovina, and the Lockerbie court. International participation in the panels in East Timor and Kosovo was legislated for by the United Nations administrations that had legislative and executive authority for those territories — the United Nations Transitional Administration in East Timor (UNTAET) and the United Nations Interim Administration Mission in Kosovo (UNMIK). The Bosnia War Crimes Chamber is a special chamber within the national jurisdiction of Bosnia, established by national law. The Lockerbie court is discussed because of its relevance as an example of a national court sitting in the territory of a third State.

A. Why were the existing tribunals and other judicial mechanisms established?

3. The particular circumstances vary, but each of the United Nations and United Nations-assisted tribunals was established as a temporary measure in a situation where the State or States concerned have been unable or unwilling to conduct trials themselves for reasons connected with recent armed conflict or with terrorist acts. These tribunals were established to achieve accountability for serious international crimes committed during the conflicts, or for terrorist acts, that were at the heart of the situation in the affected States, which rendered them unable or unwilling to prosecute. Each tribunal has the purpose of achieving accountability for these acts, but also a broader purpose of contributing to peace and stability, and national reconciliation in the State concerned. In the case of the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia, both located within the country concerned, the relevant resolutions state that the purpose for establishment also includes the strengthening of the national judicial system.

4. International participation in the trial panels in East Timor and Kosovo was introduced to enable the prosecution to meet international standards of serious international crimes that had taken place during the conflicts there. The panels were established soon after the end of the conflicts, in circumstances where the domestic judicial systems were severely depleted, lacked capacity to deal with serious international crimes, and were perceived not to be independent. Building capacity

was one of the principal aims. The establishment of the Bosnia War Crimes Chamber was also intended primarily to provide the national judiciary with the capacity to conduct trials of serious international crimes according to international standards. A very large number of serious international crimes had been committed in Bosnia during the inter-ethnic conflicts there, which the State was unable to prosecute in the situation pertaining post-conflict. It would not have been feasible for ICTY to conduct prosecutions of all such cases, and so the Bosnia War Crimes Chamber was conceived as a part of the ICTY completion strategy some 10 years after the conflicts had ended. The aim was to build the capacity of judges, prosecutors and staff. International participation is being phased out over time.

5. The Lockerbie court was a Scottish court sitting in the territory of the Netherlands in order to provide a "neutral" location for the trial of the two Libyan defendants. It was therefore quite different to the other judicial mechanisms discussed above, but is included in this report as an example of a national court sitting in the territory of a third State.

B. United Nations and United Nations-assisted tribunals

1. International Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda

6. ICTY and ICTR were established directly by the Security Council, and their statutes adopted, in resolutions[1] under Chapter VII of the Charter of the United Nations. Their judges are elected by the General Assembly from a list submitted by the Security Council.[2] The Prosecutor of each is appointed by the Security Council upon nomination by the Secretary-General. Unlike the United Nations-assisted tribunals, the resolutions and the statutes do not make any special provision for participation by the affected States. ICTY and ICTR are in this sense entirely international tribunals.[3]

7. ICTY and ICTR each have limited territorial and temporal jurisdiction. ICTY has jurisdiction over persons responsible for genocide, crimes against humanity, and war crimes,[4] committed in the territory of the former Yugoslavia since 1991. It has concurrent jurisdiction with national courts, but may assert primacy. It has indicted 161 individuals. In practice, there will be no further indictments for these crimes because ICTY is pursuing its completion strategy.[5] ICTR has jurisdiction over persons responsible for genocide, crimes against humanity and war crimes[6] committed in the territory of Rwanda, and over Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994. ICTR also has primacy over national courts. It has

[1] See Security Council resolution 827 (1993) for ICTY, and Security Council resolution 955 (1994) for ICTR.

[2] Although in recent years, as the tribunals approach their completion, the judges' terms have been extended by the Security Council and the General Assembly without elections being held.

[3] Although in practice there are nationals of the affected States working in both tribunals.

[4] Grave breaches of the Geneva Conventions of 1949, and violations of the laws or customs of war.

[5] See Security Council resolutions 1503 (2003) and 1534 (2004).

[6] Violations of art. 3 common to the Geneva Conventions of 1949 and of Additional Protocol II thereto of 1977.

indicted 92 individuals. It is also pursuing its completion strategy, and will issue no further indictments for these crimes. Since 2004, ICTY and ICTR have been directed to concentrate their efforts on the senior leaders suspected of being most responsible for crimes within their jurisdiction, with a view to the referral of accused not bearing this level of responsibility to competent national jurisdictions.[7] In practice, therefore, prosecutions are concentrating on the military or political leaders who planned or ordered crimes to be committed, rather than on those who committed offences on the ground.

2. Special Court for Sierra Leone

8. The Agreement between the United Nations and the Government of Sierra Leone on the establishment of the Special Court for Sierra Leone[8] was negotiated at the request of the Security Council.[9] The Special Court for Sierra Leone has limited territorial, temporal and personal jurisdiction. It is limited to persons who bear the greatest responsibility for the crimes set out in its statute, committed in the territory of Sierra Leone since 30 November 1996. The crimes set out in the statute include crimes under international law and under Sierra Leonean law: crimes against humanity, war crimes,[10] and offences against young girls, owing to the prevalence of child soldiers in the conflict in Sierra Leone, the Special Court for Sierra Leone statute makes specific provision for their treatment.[11] The Special Court for Sierra Leone has concurrent jurisdiction with the national courts of Sierra Leone, but as with ICTY and ICTR, it has primacy. It has indicted 13 individuals. As with ICTY and ICTR, the requirement to prosecute those who bear the greatest responsibility has meant that prosecutions have concentrated on military and political leaders who planned or ordered crimes to be committed.[12] In practice there will be no further indictments for the above crimes because the Special Court for Sierra Leone is also pursuing its completion strategy. It is probably conducting its final trial, that of Charles Taylor, the former President of Liberia.[13]

9. The Special Court for Sierra Leone Trial and Appeals Chambers comprise a majority of judges appointed by the Secretary-General and a minority appointed by the Government of Sierra Leone. The Secretary-General appoints the Prosecutor,

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[7] See Security Council resolution 1534 (2004); under both statutes, criminal responsibility extends to those who planned, instigated, ordered, or aided and abetted in the planning, preparation or execution of the crimes.

[8] Done at Freetown on 16 January 2002.

[9] See Security Council resolution 1315 (2000).

[10] Violations of art. 3 common to the Geneva Conventions and of Additional Protocol II, thereto of 1977, other serious violations of international humanitarian law.

[11] See art. 7 of the statute of the Special Court of Sierra Leone; the Court has no jurisdiction over anyone who was under the age of 15 at the time of alleged commission of the offences in question. Those who were between 15 and 18 years of age at the time of the alleged commission of offences are to be treated with dignity and a sense of worth, and in accordance with international human rights standards, in particular the rights of the child. Account must be taken of the desirability of promoting rehabilitation, reintegration and the assumption of a constructive role in society. Convicted juveniles are not subject to imprisonment, but may receive care or supervision orders, community service, counselling, foster care, training programmes, approved school, and programmes of disarmament, demobilization and reintegration into society.

[12] Criminal responsibility extends to those who planned, ordered, instigated or aided and abetted in the planning, preparation or execution of the crimes.

[13] Although there is an outstanding indictment in respect of Jonny Paul Koroma, he is suspected to be dead.

and the Government of Sierra Leone appoints a Sierra Leonean Deputy Prosecutor. Provision is made in the Agreement for consultation between the Secretary-General and the Government of Sierra Leone on all of these appointments.

3. Special Tribunal for Lebanon

10. The Agreement between the United Nations and the Lebanese Republic on the establishment of the Special Tribunal was negotiated at the request of the Security Council.[14] Following obstacles in the constitutional process for its ratification by the Lebanese Parliament, and in response to a request from the Prime Minister of Lebanon, the Security Council acted under Chapter VII of the Charter of the United Nations to bring its provisions into force.[15]

11. The Special Tribunal for Lebanon has jurisdiction over persons responsible for the attack of 14 February 2005 that resulted in the death of former Lebanese Prime Minister Rafiq Hariri and in the death or injury of 22 others. The Tribunal may also have jurisdiction over persons responsible for related attacks, subject to certain conditions. It is unique among the United Nations and United Nations-assisted tribunals in that the applicable law is stated to be Lebanese criminal law, not any provisions of international law.[16] The Tribunal and the national courts of Lebanon have concurrent jurisdiction, but the Tribunal has primacy. It has not issued any indictments to date. As with the Special Court for Sierra Leone, the international judges are in the majority in each of the chambers of the Special Tribunal for Lebanon. All judges are appointed by the Secretary-General, but the Lebanese judges are appointed by him from a list of 12 presented by the Government of Lebanon on the proposal of the Lebanese Supreme Council of the Judiciary. The Secretary-General appoints the Prosecutor, and the Government of Lebanon appoints a Lebanese Deputy Prosecutor. Unlike any of the other United Nations and United Nations-assisted tribunals, the Defence Office is also an organ of the Tribunal. The Head of the Defence Office is appointed by the Secretary-General. There is provision in the Agreement for consultation between the Secretary-General and the Government on all of these appointments.

4. Extraordinary Chambers in the Courts of Cambodia

12. The Agreement between the United Nations and the Royal Government of Cambodia concerning the Extraordinary Chambers in the Courts of Cambodia[17] was negotiated at the request of the General Assembly.[18] Unlike the other United Nations and United Nations-assisted tribunals, the Extraordinary Chambers in the Courts of Cambodia forms part of the national court structure. It is a Cambodian national court, based on the French civil law system, with a special jurisdiction, and

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[14] See Security Council resolution 1664 (2006).

[15] See Security Council resolution 1757 (2007).

[16] See art. 2 of the Special Tribunal for Lebanon statute. The offences extend to those who participate as an accomplice, organize or direct others to commit the crimes, or contribute in any other way to their commission by a group of persons acting with a common purpose. Superiors in a chain of command may also be criminally responsible where they fail to take all necessary and reasonable measures within their power to prevent them.

[17] The Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, done at Phnom Penh on 6 June 2003.

[18] See General Assembly resolution 57/228 A and 57/228 B.

with United Nations participation. It is an example of a special chamber within a national jurisdiction.

13. The Extraordinary Chambers in the Courts of Cambodia was established by a provision of Cambodian national law that specifies that it will come to an end when it has carried out its mandate. It applies a mixture of international and Cambodian law. Its jurisdiction is limited to the senior leaders of Democratic Kampuchea, and those most responsible, for genocide, crimes against humanity, and grave breaches of the 1949 Geneva Conventions, and various crimes under the Cambodian Penal Code, including homicide, torture, religious persecution and the destruction of cultural property. The temporal limit of its jurisdiction is the period from 17 April 1975 to 6 January 1979. Its rules of procedure are those of Cambodian law, with some adjustments to ensure consistency with international standards. There is no question of concurrent jurisdiction or primacy over national courts because the Extraordinary Chambers in the Courts of Cambodia is a national court of Cambodia. In practice, the limited jurisdiction means that the Extraordinary Chambers in the Courts of Cambodia is likely to try around 10 individuals considered to be senior leaders and those most responsible for the crimes within its jurisdiction, who in practice are political or military leaders who allegedly planned or ordered the commission of the crimes. To date, it has indicted five individuals.

14. All of the judges are appointed by the Cambodian Supreme Council of the Magistracy, although the international judges are nominated by the Secretary-General. Unlike the other United Nations-assisted tribunals, the international judges are in the minority in each of the chambers of the Extraordinary Chambers in the Courts of Cambodia. There are two co-investigating judges, one international and one national; and two co-prosecutors, one international and one Cambodian. Concerns about the adequacy of the provisions for international participation led the then-United Nations Legal Counsel to withdraw from the negotiations with the Government of Cambodia in 2002, which led to the General Assembly requesting in early 2003 that negotiations resume without delay.[19] The concern is dealt with in the Agreement through the so-called "super majority" decision-making rule.[20] In effect, this means that in circumstances where the judges' views divide along national and international lines, the national judges would require an affirmative vote of at least one of the international judges to carry the decision.

15. Uniquely for a United Nations or United Nations-assisted tribunal, participation in the Extraordinary Chambers in the Courts of Cambodia by the United Nations is run as a technical assistance project, through the United Nations Assistance to the Khmer Rouge Trials (UNAKRT), which forms the international component of the Administration of the Extraordinary Chambers in the Courts of Cambodia. The Director of Administration is Cambodian, and the Deputy Director is international and is the most senior UNAKRT official. In this sense, the Administration of the Extraordinary Chambers in the Courts of Cambodia is "double-headed", as is the Office of the Co-Investigating Judges and the Office of the Co-Prosecutors. This inevitably presents challenges in terms of efficiency, and differences of approach and emphasis, but also offers great opportunities for capacity-building and a genuine interchange of views and ideas.

[19] See General Assembly resolution 57/228.

[20] See art. 4 of the Agreement.

C. Special Panels established in East Timor and Kosovo, the Bosnia War Crimes Chamber, and the Lockerbie court

1. Special Panels for serious crimes in East Timor

16. Following a failed proposal to establish an international tribunal for crimes committed in East Timor in 1999, UNTAET established Special Panels within the domestic District Court and Court of Appeals in Dili to try those responsible for serious international crimes, and selected common crimes, which took place in East Timor since January 1999. UNTAET derived its authority from Security Council resolution 1272 (1999) of 25 October 1999, adopted under Chapter VII of the Charter of the United Nations. It was endowed with overall responsibility for the administration of East Timor and empowered to exercise all legislative and executive authority, including the administration of justice. As such, the United Nations was able to legislate for international participation in East Timor's domestic jurisdiction without the need for an agreement to be negotiated between the United Nations and the East Timor authorities.

17. The Special Panels were established to address a severely depleted judicial system, in which there was an absence of adequate criminal legislation, court infrastructure, trained judges, prosecutors, and court administrators. The Special Panels consisted of two Trial Panels and one Appeals Panel, each composed of two international judges and one East Timorese judge. In cases of special importance or gravity, Special Panels composed of three international judges and two East Timorese judges could be established in the Appeals Court. A Transitional Judicial Service Commission composed of three East Timorese and two international members recommended candidates for the Special Panels positions to the Transitional Administrator, who made appointments. From 2000, a public prosecution service was established with an international Deputy General Prosecutor. The administrative support system of the Special Panels was headed by the Judge Coordinator, an international staff member. Security Council resolution 1543 (2004) determined that 10 priority cases should be focused on, and that trials and other activities should be concluded as soon as possible, and no later than 20 May 2005. By that date, in the space of five years, 391 persons were indicted, and 55 trials were conducted involving 87 defendants.

2. UNMIK trial panels

18. A proposal to establish a Kosovo War and Ethnic Crimes Court, an ad hoc tribunal sitting in Kosovo, modelled on ICTY, was abandoned in September 2000 because Member States became increasingly concerned about the cost of a free-standing court, and feared that it would not be possible to provide the necessary security in Kosovo. From 2000, under the authority of UNMIK, international judges were deployed to trial panels in Kosovo's courts, and prosecutors were deployed to Kosovo's public prosecutors' offices, with the aim of strengthening the independence of the judiciary and the proper administration of justice. An exodus of judges and legal professionals during the conflict in Kosovo had left an inexperienced judicial system, about which concerns were raised of ethnic bias. The international judges and prosecutors focused on cases involving war crimes, inter-ethnic violence, and other serious crimes. Authority for these deployments derived from Security Council resolution 1244 (1999) of 10 June 1999, adopted under Chapter VII of the Charter of the United Nations, which authorized the

Secretary-General to establish an interim administration for Kosovo with legislative and executive powers. As the interim administration, the United Nations was able to legislate for this international participation in Kosovo's domestic jurisdiction without the need for an agreement to be negotiated between the United Nations and the Kosovo authorities.

19. The early experience of these deployments of international judges and prosecutors to trial panels within Kosovo was not encouraging in terms of their impact on the proper administration of justice. The fact that the international judges were in the minority in the trial panels was regarded as leading to their having marginal influence on the judicial process and standards of justice. UNMIK therefore amended its legislation to enable at least two international judges to sit in three judge trial panels where necessary. These international panels in practice became the norm, and the earlier panels with a majority of national judges were abandoned. In March 2003, a Criminal Division within UNMIK was established that was composed exclusively of international prosecutors and international lawyers supporting the prosecutors, which worked in parallel with domestic prosecutorial services. International participation in trials continues to this date, and, since January 2009, UNMIK has handed responsibility for this to the European Union.

3. War Crimes Chamber in the State Court of Bosnia and Herzegovina

20. The War Crimes Chamber of the State Court of Bosnia is a further example of a special chamber within the national jurisdiction of a State, with international participation, although not United Nations participation. Security Council resolution 1503 (2003) of 28 August 2003 provided that an essential prerequisite for achieving the objectives of the ICTY completion strategy was the establishment of a special chamber within the State Court of Bosnia and Herzegovina to receive cases referred from ICTY against lower or intermediate rank accused. The Bosnia War Crimes Chamber was established in 2003 by national legislation, with the intention that its international components would be phased out and ultimately become national. It began functioning in 2005, and as a national court will continue indefinitely, including after the international components are phased out.

21. The Bosnia War Crimes Chamber is composed of six Trial Panels and two Appellate Panels. Initially, each Panel was composed of two international judges and one national judge, with the national judges presiding. Since January 2008, most of the Panels dealing with war crimes have reversed this composition so that there are two national judges and one international judge. The goal is to change the composition of all trial and appellate Panels in this fashion. There are both national and international prosecutors working within the Special Department for War Crimes, which is within the State Prosecutor's Office of Bosnia and Herzegovina. The Registry for War Crimes, which provides administrative, financial and logistical support, and coordinates the activities of the State Court, also consists of national and international staff. The Criminal Defence Office is staffed by nationals and headed by an international Director. It keeps a roster of defence lawyers, organizes their training, and provides for legal advice, research, and support.

22. Initially, the international judges and prosecutors were appointed by the European Union High Representative for Bosnia and Herzegovina. Since 2006, appointments have been made nationally by the High Judicial and Prosecutorial Council of Bosnia and Herzegovina in coordination with the President of the State

Court and the Chief Prosecutor. The international judges are seconded by their Governments, and are given short-term, renewable contracts, usually for one or two years.

23. The applicable substantive and procedural law is national. The Bosnia War Crimes Chamber has jurisdiction over four categories of war crimes, crimes against humanity and genocide cases. Jurisdiction is limited to offences committed within Bosnia and Herzegovina, and include indictments referred from ICTY in accordance with Rule 11 bis of the ICTY Rules of Procedure and Evidence (i.e., the accused not meeting the threshold of being senior leaders most responsible), other cases investigated but not indicted by the ICTY Prosecutor, and cases investigated nationally by the Bosnian authorities. The Bosnia War Crimes Chamber deals with a very high volume of cases. As of 30 April 2010, there were 439 cases before the Bosnia War Crimes Chamber. It has been estimated that around 6,000 accused fall within its jurisdiction in total.

4. The Lockerbie court

24. The Lockerbie court was the Scottish High Court of Justiciary, which sat at Camp Zeist, part of the decommissioned United States Soesterberg Air Base outside Utrecht in the Netherlands. It prosecuted two Libyan suspects accused of the bombing of Pan Am flight 103 over Lockerbie, Scotland. The Government of the United Kingdom and the Government of the Netherlands concluded an agreement regulating the sitting and functioning of the Lockerbie court in the Netherlands. Under the agreement, the Netherlands undertook to host the Lockerbie court and to provide premises for the trial, and the Lockerbie court was endowed with full juridical personality. The Netherlands allowed the detention of the accused within the premises of the Lockerbie court in accordance with Scots law and practice for the purposes of the trial, and, in the event of conviction, pending their transfer to the United Kingdom for imprisonment. The jurisdiction of the Lockerbie court was limited to the trial of the two accused. They were charged with the offences of conspiracy to murder, murder, and contravention of aviation security legislation in the United Kingdom. The applicable substantive and procedural law was Scots law. The United Kingdom bore all the costs relating to the establishment and sitting of the Lockerbie court in the Netherlands, and reimbursed all costs incurred by the host country.

D. Practical considerations in the establishment and functioning of the United Nations and United Nations-assisted tribunals, and of other relevant judicial mechanisms

25. This section sets out various practical considerations that have arisen in relation to the establishment and functioning of the United Nations and United Nations-assisted tribunals, and other relevant judicial mechanisms discussed above.

Cooperation

26. A particularly important form of cooperation for each of the tribunals is the enforcement of sentences in third States. The United Nations and United Nations-assisted tribunals have detention facilities for suspects, but do not have prison facilities for those convicted. Further, the host States of these tribunals are generally

not prepared to enforce sentences. All of the United Nations and United Nations-assisted tribunals, with the exception of the Extraordinary Chambers in the Courts of Cambodia, are therefore dependent on the willingness and ability of third States to enter into agreements with them on the enforcement of sentences. The existing tribunals have identified third States and negotiated these agreements after establishment, but are finding it increasingly difficult to do so. Moreover, such agreements concluded by existing tribunals do not oblige the third State to accept any particular convicted person, but only to consider the request. In practice, finding such third States willing and able to enter into such agreements, and able to provide prison conditions to international standards, has not proved easy. The tribunals also require cooperation from third States in order to enter into agreements on the relocation of witnesses, if this is necessary.

27. Each of the United Nations and United Nations-assisted tribunals is also heavily dependent on cooperation by States to be able to investigate and secure the arrest and transfer of indictees. All States have a legal obligation under Chapter VII of the Charter of the United Nations to cooperate with ICTY[21] and ICTR.[22] In relation to the Special Court for Sierra Leone, the Special Tribunal for Lebanon and the Extraordinary Chambers in the Courts of Cambodia, each of the States concerned has an obligation to cooperate with the relevant tribunal under the provisions of its agreement with the United Nations.[23]

Length of time needed for establishment and functioning of judicial mechanisms

28. The length of time needed from the initial request or decision by a political organ of the United Nations to the establishment and subsequent functioning of the tribunals has varied, but it has generally been a matter of years, rather than weeks or months. The time periods for ICTY and ICTR were the shortest. Their statutes were drafted by the Secretary-General within periods of 60 days, and submitted to the Security Council in response to requests by the Council.[24] They each began functioning around one year later. For the Special Court for Sierra Leone, it took two years of negotiation from the initial request by the Security Council until the conclusion of the Agreement between the United Nations and the Government of Sierra Leone on the establishment of the Special Court for Sierra Leone.[25] It commenced functioning in July 2002, some two years after the initial request.[26] For the Extraordinary Chambers in the Courts of Cambodia, it took six years from the initial request by the General Assembly until the conclusion of the Agreement between the United Nations and the Royal Government of Cambodia concerning the

[21] See Security Council resolution 827 (1993), and art. 29 of the ICTY statute.

[22] See Security Council resolution 955 (1994), and art. 28 of the ICTR statute.

[23] See art. 17 of the Agreement between the United Nations and the Government of Sierra Leone on the establishment of the Special Court for Sierra Leone; art. 15 of the Agreement between the United Nations and the Lebanese Republic on the establishment of the Special Tribunal for Lebanon; and art. 25 of the Agreement between the United Nations and the Royal Government of Cambodia concerning the Extraordinary Chambers in the Courts of Cambodia.

[24] The Secretary-General was requested to prepare reports in Security Council resolutions 808 (1993) for ICTY and 935 (1994) for ICTR.

[25] From 2000 to 2002.

[26] The Secretary-General was requested to negotiate an agreement with the Government of Sierra Leone to create an independent special court in Security Council resolution 1315 (2000). The United Nations and the Government of Sierra Leone concluded such an agreement on 16 January 2002.

Extraordinary Chambers in the Courts of Cambodia.[27] It started functioning on 11 September 2006, some nine years after the initial request by the General Assembly. The negotiation of the Agreement between the United Nations and the Lebanese Republic on the establishment of the Special Tribunal for Lebanon took one year to negotiate.[28] It commenced functioning on 1 March 2009, some three years after the initial request by the Security Council.

Composition of any new judicial mechanism

29. The composition and status of each of the United Nations and United Nations-assisted tribunals varies. In each, the judges selected by the United Nations either comprise the entirety of the judges (ICTY and ICTR), or they are in the majority in the chambers to which they are assigned (Special Court for Sierra Leone and Special Tribunal for Lebanon). In the case of the Extraordinary Chambers in the Courts of Cambodia, the "super majority" voting rule means that a decision cannot be taken without the support of at least one of the international judges. ICTY and ICTR, which are entirely international in nature, and which sit outside the affected countries, face a challenge in ensuring that they leave a strong legacy of an enhanced capacity to prosecute serious international crimes, and a strengthened rule of law in the affected countries. Experience from the Bosnia War Crimes Chamber demonstrates that, in a national judicial system that has had time to recover from conflict, a well-planned comprehensive approach of capacity-building of the national system, combined with international participation in each of the organs of the court, can be successful. It can enable a gradual move to national ownership through national judges being in the majority in the chambers, and then to a phasing out of the international components altogether over time. Conversely, international participation in trial panels in Kosovo, introduced soon after the conflict was over, when the judicial system was barely functioning and international judges were not in the majority in trial panels, was seen as insufficient, and increased internationalization was regarded as necessary to improve the administration of justice.

Jurisdiction

30. The existing United Nations and United Nations-assisted tribunals have a limited temporal jurisdiction, and either a limited geographical jurisdiction, or a jurisdiction limited to specific events. Unlike the Bosnia War Crimes Chamber and other relevant judicial mechanisms, each of the United Nations and United Nations-assisted tribunals will indict only a limited number of individuals, primarily being

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[27] The General Assembly, by its resolution 56/169, urged the Cambodian Government and the United Nations to conclude an agreement without delay. Such an agreement was concluded on 6 June 2003. However, the General Assembly had been seized with this matter since June 1997, when the Cambodian Co-Prime Ministers requested United Nations assistance in organizing the process for the Khmer Rouge trials.

[28] The Security Council, in its resolution 1664 (2006), requested the Secretary-General to negotiate an agreement with the Government of Lebanon aimed at establishing a tribunal of an international character. The Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon was signed by the Government of Lebanon on 23 January 2007 and by the United Nations on 6 February 2007. The United Nations had been seized with this matter since April 2005, when the Security Council adopted resolution 1595 (2005), establishing an international independent investigation Commission on the death of former Lebanese Prime Minister Rafiq Hariri and the death or injury of 22 others.

those who are the senior leaders or those bearing most responsibility for the crimes within the jurisdiction. The personal jurisdiction of the Special Tribunal for Lebanon is not limited to senior leaders and those most responsible, but the number of those involved in the attacks within (and potentially within) its jurisdiction are likely in practice to be limited. Each of the tribunals, except the Extraordinary Chambers in the Courts of Cambodia (which is a national court), has concurrent jurisdiction with national courts, but can assert primacy at any stage of national proceedings.

Primacy or complementarity

31. The relationship between international and national criminal jurisdiction can be organized either by giving concurrent jurisdiction, but with the right of the international tribunal to assert primacy over particular cases, or by the principle of complementarity. ICTY, ICTR, the Special Court for Sierra Leone and the Special Tribunal for Lebanon all have concurrent jurisdiction with national courts, but may assert primacy. The right to assert primacy avoids simultaneous exercise of jurisdiction over an accused, which would be contrary to the principle of *non bis in idem*. ICC, a court established by a multilateral treaty, has jurisdiction based on the principle of complementarity. This principle means that it can only investigate and prosecute international crimes falling within its jurisdiction when national jurisdictions are unable or unwilling to do so. There is no question of primacy or complementarity in the case of the Extraordinary Chambers in the Courts of Cambodia because it is embedded in a national court of Cambodia.

Financing

32. The United Nations and the United Nations-assisted tribunals require significant financial support both at the commencement stage, and for their continued operations. The initial annual costs were: ICTY: $10.8 million; ICTR: $13.4 million; Special Court for Sierra Leone: approximately $19.4 million ($19,425,781); and Special Tribunal for Lebanon: $51.4 million. The initial costs for the Extraordinary Chambers in the Courts of Cambodia were $100.4 million for the first four years; that is, from 2006 to 2009 (of which $78.7 million was for the international component, and $18.7 million was for the national component). The costs of each of these tribunals to date have peaked at the following amounts: ICTY: $376.2 million (for the biennium 2008-2009); ICTR: $292.9 million (for the biennium 2008-2009); Special Court for Sierra Leone: $36,124,200 (budget for 2008); Special Tribunal for Lebanon: $55,347,730 (budget for 2009); and Extraordinary Chambers in the Courts of Cambodia: $92.3 million (for the biennium 2010-2011, of which $69.1 million is for the international component and $23.2 million is for the national component). The current costs of these tribunals are: ICTY: $290.9 million (for the biennium 2010-2011); ICTR: $245.3 million (for the biennium 2010-2011); Special Court for Sierra Leone: $20,674,600 (budget for 2010); Special Tribunal for Lebanon: $55,347,730 (budget for 2010); and Extraordinary Chambers in the Courts of Cambodia: $92.3 million (for the biennium 2010-2011).

33. Funding for the Bosnia War Crimes Chamber and the Special Department for War Crimes is provided by the European Commission, the Government of Bosnia and Herzegovina, and voluntary financing by States. Management of the Bosnia War Crimes Chamber is handled internally by a management committee, but funding oversight is provided by representatives of the Bosnian authorities and diplomatic

representatives of donor States in Sarajevo. The average annual cost of the Bosnia War Crimes Chamber from 2005 to 2009 was 13 million euros. The Bosnian Government is gradually assuming a greater proportion of the financing, and, in 2008, its contribution (8.6 million euros) exceeded international contributions (5.1 million euros) for the first time. The Government of Bosnia and Herzegovina is expected to begin funding the Bosnian War Crimes Chamber and the prosecution department entirely from 2010.

34. The Special Panels in East Timor were funded through UNTAET and subsequently the United Nations Mission of Support in East Timor (UNMISET), which received both United Nations-assessed contributions and voluntary contributions from States. For the period from 2003 to 2005, the total operating cost of the Special Panels in East Timor was approximately $14.3 million. The financing of the Trial Panels in Kosovo, including of the international judges, was divided between the budget of UNMIK, which is financed from United Nations-assessed contributions, and the domestic budget of Kosovo. The salaries of the international prosecutors and administrative and other support staff (interpreters, court recorders and legal officers) came from the UNMIK budget.

35. ICTY and ICTR, as subsidiary organs of the Security Council, are funded from United Nations-assessed contributions. The United Nations-assisted tribunals are all financed from voluntary contributions.[29] In practice, this has proved to be a problematic basis for financing international justice. It has caused regular funding challenges and difficulties of forward planning. A relatively small number of States forms the principal donors to these tribunals, which therefore carry the bulk of the financial responsibility, and now do so in difficult economic times when there is competition for scarce resources.

Oversight

36. The oversight of the financing and non-judicial aspects of the work of the United Nations and United Nations-assisted tribunals at United Nations Headquarters also takes various forms. As ICTY and ICTR are funded through assessed contributions, they are under the financial control of the General Assembly, acting through its Fifth Committee. The Security Council, as their parent body, also plays an important role in considering matters such as any necessary amendments to their statutes, and extensions to the terms of office of the judges and the Prosecutors. All such matters are considered in detail at the working level by the Security Council Informal Working Group on International Tribunals, which, with the assistance of the Office of Legal Affairs, drafts all necessary resolutions for adoption by the Security Council. The Working Group is currently heavily engaged in considering the ICTY and ICTR completion strategies and the need for a future residual mechanism to continue certain essential functions of the tribunals after their closure.

37. The Special Court for Sierra Leone and the Special Tribunal for Lebanon have Management Committees comprising representatives from the Permanent Missions of the Governments that are the principal donors to the tribunal concerned. These Committees determine the tribunals' budgets, and provide policy direction and advice on all non-judicial aspects of the tribunals' operations. The Special Court for

[29] The financing of the national component of the Extraordinary Chambers in the Courts of Cambodia is the responsibility of the Royal Government of Cambodia, and 49 per cent of the financing of the Special Tribunal for Lebanon is borne by the Government of Lebanon.

Sierra Leone Management Committee is also heavily engaged in consideration of the Court's completion strategy and the establishment of a future residual mechanism. The Extraordinary Chambers in the Courts of Cambodia does not have a Management Committee, but has a Steering Committee that does not have budgetary authority. It also comprises representatives from the Permanent Missions of the Governments that are the principal donors, and it provides guidance on non-judicial matters. Budgetary authority lies with a broader grouping of interested States that meet infrequently. These Committees are advised and assisted in their relationship with the respective tribunals by the Office of Legal Affairs. Experience suggests that a strong link between the tribunal and an active management committee, with budgetary authority, provides the most efficient and effective means of budgetary oversight and policy guidance to the voluntarily funded tribunals and other judicial mechanisms.

Completion and residual issues

38. For all tribunals that are not of a permanent character, there will inevitably be a need to consider a strategy for the completion of the tribunal's work and for the carrying out of the residual functions following its closure. Such functions include the protection of witnesses, the monitoring of sentence enforcement, hearing applications for review of judgment, and the management of the archives. Depending on the circumstances, some tribunals also require the authority to try fugitives not brought to justice before closure. It is clear that some of these functions, e.g., the protection of witnesses and the monitoring of sentence enforcement, could potentially last for several decades. Establishing a tribunal requires sustained political and financial commitments going beyond the anticipated lifespan of the tribunal itself. For special chambers within the national jurisdiction of a State, the special chamber itself may or may not be indefinite, depending on the wishes of that State. A special chamber with a definite lifespan would face the same residual issues as a tribunal, and would equally require some form of residual mechanism to carry out the residual functions. A special chamber with an indefinite lifespan would not require a completion strategy or residual mechanism, but unless the United Nations is prepared to take on an open-ended commitment to its participation in any such chamber, its participation would at some point need to be brought to an end. In that circumstance, some form of continued United Nations presence may be necessary with a view to ensuring that residual functions are carried out by the national chamber to international standards.

Annex II

Contact Group on Piracy off the Coast of Somalia

1. The Contact Group on Piracy off the Coast of Somalia was established on 14 January 2009 to facilitate discussion and coordination of actions among States and organizations to suppress piracy off the coast of Somalia. It was established after the Security Council, in its resolution 1851 (2008), encouraged "all States and regional organizations fighting piracy and armed robbery at sea off the coast of Somalia to establish an international cooperation mechanism to act as a common point of contact between and among States, regional and international organizations on all aspects of combating piracy and armed robbery at sea off Somalia's coast".

2. The Contact Group operates through four working groups: Working Group 1 (convened by the United Kingdom with the support of the International Maritime Organization (IMO)) addresses activities related to military and operational coordination and information sharing and the establishment of the regional coordination centre; Working Group 2 (convened by Denmark with the support of the United Nations Office on Drugs and Crime (UNODC)) addresses legal issues related to piracy; Working Group 3 (convened by the United States with the support of IMO) addresses shipping self-awareness and other capabilities; and Working Group 4 (convened by Egypt) works on improving diplomatic and public information efforts on all aspects of piracy.

Consideration by the Contact Group on Piracy off the Coast of Somalia of national prosecutions, imprisonment by States and United Nations assistance

3. In the five meetings that have been held since January 2009, Working Group 2 of the Contact Group has addressed a number of important legal issues relevant to the efforts of States to combat piracy and armed robbery at sea off the coast of Somalia. The main purpose of those discussions was to encourage the prosecution and the imprisonment of suspects within national legal systems. Issues such as the international legal framework applicable to piracy, national laws on piracy and armed robbery at sea, legal and practical challenges to national prosecutions, the apprehension and the detention of suspected pirates at sea, capacity-building, the use of force, and applicable human rights considerations were discussed. The discussions focused on being as practical as possible, and resulted in a "toolbox" of relevant resources and precedents that States and organizations may use to strengthen their capacity to combat piracy and armed robbery at sea.

4. UNODC prepared and circulated a report based on the responses to a questionnaire on legal and practical challenges to national piracy prosecutions. The report provides an analysis of the different legal elements that are needed, including the criminalization of piracy and armed robbery at sea or other relevant offences, the liability of persons for these offences in the case of participation or attempts, provisions establishing sufficient criminal jurisdiction to allow for the national prosecution of offences that happen on the high seas, and evidentiary and procedural requirements in national laws. All of these elements may impact on the apprehension and successful prosecution of suspects.

5. Working Group 2 has identified and addressed a series of impediments to national prosecutions of those suspected of piracy and armed robbery at sea, including legal and/or practical impediments for patrolling naval States. States

affected by piracy and armed robbery at sea, and States willing to prosecute suspected pirates. For example, practical tools, such as guidance regarding the collection and transfer of evidence by patrolling naval States, have been shared, and there have been discussions on how best to ensure that witnesses attend trials. INTERPOL has provided information on its efforts to ensure the collection and the dissemination of information. States that are currently prosecuting suspects report on progress in those cases, and any challenges they face.

6. The meetings have been used as a forum by States to urge other States to exercise their jurisdiction in cases where they have an interest, for example, where their flag vessel has been attacked, or their nationals are victims. The regional States' need for capacity-building has been a major element in discussions, and UNODC has briefed Working Group 2 extensively on its programme to support ongoing prosecutions, detention and imprisonment. IMO has briefed on its implementation of the Djibouti Code of Conduct. Other issues considered concern the use of force in a maritime law enforcement context, and the application of human rights obligations to the apprehension, the detention and the transfer of those suspected of piracy and armed robbery at sea.

Consideration by the Contact Group on Piracy off the Coast of Somalia of possible judicial mechanisms

7. The consideration of possible judicial mechanisms in Working Group 2 gave rise to a number of non-papers by States, to two informal meetings hosted by the Government of the Netherlands, and to a discussion paper prepared by the Chair of Working Group 2, which was considered by the Contact Group at its plenary meeting on 28 January 2010. In that meeting, the Chair noted that States and organizations continue to have different views on the need to establish any additional mechanism for prosecution, and stressed that Working Group 2 had agreed that the discussion regarding models for such mechanisms should be undertaken without prejudice to the position of States and organization on the need for any such mechanism. The Chair wrote to the Office of Legal Affairs on 9 June 2010, enclosing his conclusions of the Working Group 2 meetings, his discussion paper and the other relevant non-papers and documents.

8. The importance of the need to find a host State for any new judicial mechanism was underlined, as was the need for any such State to have arrangements with third States so that it does not become a "haven", but is able to repatriate or transfer to third States those persons who are acquitted, those serving sentences, and those who have served their sentences. It was noted that the crime of piracy is of a different nature and scope to the serious international crimes normally dealt with by international tribunals, and that suspected pirates brought before any such new international tribunal would be unlikely to meet the criterion of being the "most responsible" for the crimes in question, which is a threshold applied by most of the current international tribunals. There was broad agreement that it may not be viable to extend the competence of the International Criminal Court to include the crime of piracy, nor to amend the competence of the International Tribunal on the Law of the Sea.

9. Three categories of possible models for a new judicial mechanism were identified: an international tribunal; a regional tribunal; and a tribunal based in the national jurisdiction of a State in the region. Under the first category, the possibilities identified were an international tribunal established pursuant to a Security Council

resolution adopted under Chapter VII of the Charter of the United Nations, or a "hybrid" tribunal following the model of the Special Court for Sierra Leone or the Special Tribunal for Lebanon, based on an agreement with the United Nations. Under the second category, the possibilities identified were a regional tribunal established through a multilateral agreement negotiated among the States of the region, or the use of an existing court, such as the African Court on Human and Peoples' Rights, located in Arusha, Tanzania. It was noted that the time required to negotiate the appropriate treaty basis for either of these options might be considerable. Under the third category, the possibilities identified were a Somali court located in a third State in the region, or a special piracy chamber within the national jurisdiction of a State in the region. It was recognized that the Somali court option would have the advantage of enabling Somalia to play a direct part in the solution to prosecuting acts of piracy. However, the fractured nature of the law on piracy in Somalia, and significant issues concerning Somali judicial and prosecutorial capacity, meant that this option may be unlikely to be viable at present.

10. The option of a specialized piracy chamber within the national jurisdiction of one or more States in the region, supported by financial or technical assistance by the international community, was considered to follow the precedent of the Bosnia War Crimes Chamber. The Chair noted in his conclusions of the meeting in November 2009 that this would be the most feasible model, depending on one or more regional States, including Somalia, being willing and able to undertake prosecutions when it becomes possible.

11. The Chair travelled to the region in November 2009 for consultations with States and organizations. There were differing views on the need to establish any new judicial mechanism. He did not receive a clear indication from any State of a willingness to host a new judicial mechanism. Regional States and organizations emphasized that the focus should be on supporting existing mechanisms through capacity-building or other assistance. The particular kind of support offered should depend on the needs of States in the region willing to prosecute, and should add value to the already existing mechanisms. The possibility for transferring prisoners from the prosecuting State for imprisonment in a third State would be one important way of burden-sharing.

International Trust Fund to Support Initiatives of States Countering Piracy off the Coast of Somalia

12. The International Trust Fund to Support Initiatives of States Countering Piracy off the Coast of Somalia was established on 27 January 2010 through endorsement by the Contact Group on Piracy off the Coast of Somalia and the United Nations Controller. The overall purpose of the International Trust Fund is to support the implementation of the Member States' initiatives regarding combating piracy and armed robbery at sea off the coast of Somalia. It also provides a means to States and the shipping industry to make financial contributions.

13. The International Trust Fund has received $2,973,900 since its establishment, and has recommended the disbursement of $2,437,372 to fund a total of six projects supporting prosecution and detention-related activities in Kenya, Seychelles and Somalia, and a strategy to enable the Transitional Federal Government to raise awareness among Somali populations in general, and young people in particular, of the risks associated with involvement in piracy and other criminal activities.